ADVISORY OPINION NO. 2012-02

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner,** who is also a licensed real estate sales associate, asks whether the County may purchase property from a real estate business with which he is associated.

FACTS RELIED UPON BY THE COMMISSION

A County Commission is considering a property purchase. The decision to purchase this property was made by the County's Building Commission, an arm of the County Commission.

According to the County's Prosecutor, the Building Commission has determined that it is in the best interest of the County to purchase the property. The Prosecutor states that it made this decision based upon the following factors: the subject property is adjacent to property owned by the County; the Building Commission has determined that this property is the only available property that will satisfy the needs of the County to have a place for the convenient storage of maintenance equipment; and, due to its location, the property may also be used for parking for county employees. The Prosecutor states that the Building Commission did not evaluate other properties as there are no other properties available in the immediate vicinity that are on the market for sale.

The listing agent for the subject property is a real estate business with which the Requester has a business relationship. The Requester is a licensed real estate sales associate. He states that a requirement of his licensure is to work under the supervision of a broker. The owner and/or a principal in the real estate firm which serves as the listing agent for the property in question is the broker by which he is supervised. He states that he is not an employee or owner of the business/broker and receives no W-2 or 1099 from this business. His only compensation from the real estate business is in the form of commissions he receives on property sales for which he serves as the listing agent.

He is not the listing agent on the property under consideration for purchase by the County. Moreover, he states that he will receive no compensation from the sale of the subject property nor is his compensation from this business tied to its overall sales, only his own. Finally, neither he nor any of his family members have an ownership interest in the property.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

W. Va. Code§ 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he ... is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he ... may have control...

W. Va. C.S.R. § 158-8-4 states that... [P]ublic officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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

U) *Limitations on Voting.*

(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. Business with which they are associated means a business of which the person or an immediate family member 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.

(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; or

(3) For a public official's recusal to be effective, it is necessary to excuse himself ... from participating in the discussion and decision-making process by physically removing himself ... from the room during the period, fully disclosing his ... interests, and recusing himself ... from voting on the issue.

W. Va. Code§ 61-10-15 states in part that ... (a) It is unlawful for any member of a county commission ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control...

(e) The provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

(1) Is not a party to the contract;
(2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
(3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
(4) Does not participate in the deliberations or awarding of the contract; and
(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

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Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The Ethics Act

Pursuant to W.Va. Code§ 6B-2-5(d)(1), a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. In this case, the Requester is an elected member of the County Commission that is considering purchasing property listed by a real estate business with which he is associated.

Neither the Requester nor his immediate family members have an ownership interest in the subject property. The Requester is not: a director or officer; the listing agent for the property; or, entitled to receive any commission from the sale of the property. Further, his compensation and bonuses, if any, are not tied to the sales of other agents in the business. As a result of the foregoing, the Ethics Commission finds that the Requester does not have a prohibited financial interest in the subject sale based upon the plain language in the Ethics Act and related legislative rule. Hence, while he is associated with the business, he does not have a prohibited financial interest for purposes of the Ethics Act. *See* A.O. 2011-03 and W.Va. C.S.R. § 158-8-4 which sets forth the circumstances under which a public official's association with a business constitutes a prohibited financial interest in a public contract for purposes of the limitations in the Ethics Act, W.Va. Code§ 6B-2-5(d)(1).

Limitations do apply. The Requester may not use his position to influence the purchase of the property, e.g. he may not communicate with his fellow County Commissioners, Members of the Building Commission, or their respective staffs, on matters relating to the property. Moreover, the decision of the County Commission or Building Commission to purchase the property must be based upon the best interests of the county, **not** favoritism.

If a matter relating to the subject sale comes before the County Commission, then the Requester must recuse himself from all discussions and votes on such matter. For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter. Additionally, the minutes of the meeting must reflect the basis for the recusal and that the he left the room during all consideration, discussion and vote on the item(s) under consideration.

West Virginia Code § 61-10-15

W. Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any "member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer" who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949).

In 2002 the Legislature amended this provision to exempt public officials who are employees of a vendor or supplier if the public official:

(1) Is not a party to the contract;
(2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
(3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
(4) Does not participate in the deliberations or awarding of the contract; and
(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

Based upon the facts presented, the Commission finds that the five part test is met. *See* A.O. 2011-03. Hence, the County Commission may proceed to purchase the subject property. Still, the Requester and County must abide by the limitations set forth above.

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