ADVISORY OPINION NO. 2012-16

Issued On May 3, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks whether it may purchase private property from an appointed member of the County Building Commission in order to build a new 911 center.

FACTS RELIED UPON BY THE COMMISSION

The Requester desires to build a new Office of Emergency Services/ 911 Center (hereinafter "911 Center"). In furtherance thereof, the County Commission directed the County OES/911 Director and Assistant Director to seek out potential sites to build the new 911 Center.

According to the Requester, only two viable locations were found. The first location was a business/industrial park that is owned and operated by the County Building Commission. The second site was private property which is owned by a Management company. The Management company is owned and operated by an appointed board member of the County Building Commission.

The Requester states that it performed a comparative analysis of the two locations, concluded that the private property was the best location, and entered into an Option Agreement to purchase the private property owned and operated by the Building Commission Board Member. In light of such, the Requester asks the following questions:

1. Is it a conflict of interest for the County Commission to purchase property that is privately owned by a member of the County Building Commission, and
2. May the County Commission bypass the Building Commission and purchase the property in its own name?

The Requester, however, states that when it comes time to build the 911 Center the County will use the Building Commission to finance the project.

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.

Further, W.Va. Code§ 6B-2-5(d)(3) states:

> If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.

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

It is unlawful for any member of a county commission, ... or any member of any other county or district board or any county or district officer 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...

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In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code§ 6B-1-2(d). The Requester's proposed purchase of property from a member of the County's Building Commission presents one such potential conflict.

Both the Ethics Act and W.Va. Code§ 61-10-15 prohibit county public officials from having an interest in public contracts. Specifically, W.Va. Code§ 6B-2-5(d)(3) states that "if a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest." W. Va. Code§ 61-10-15, a separate criminal statute, imposes criminal penalties against **County** officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control." (emphasis supplied).

Since the proposed purchase involves the County Commission and an individual who is also a county official, the Ethics Commission must first analyze the application of W.Va. Code§ 61-10-15 to the proposed sale.

Here, the County Commission seeks to purchase property for public use. In accordance with W.Va. Code§ 8-33-1, the County Commission has established a County Building Commission to manage and control the properties of the County. [1] The Requester states that following the purchase of the property, the County Building Commission will be responsible for the financing of the construction of a 911 Center.

According to the Requester, the County Commission considered two potential properties. One property is owned by a private landowner and the other property is owned by the County through its Building Commission. Notwithstanding the availability of the County-owned property, the County Commission has entered into an option to purchase property from the private landowner. [2]

The private landowner is an appointed member of the County Building Commission. Appointed Board Members of a County Building Commission are subject to the restrictions of W.Va. Code§ 61-10-15 ("any member of any other county or district board"). As the seller of the property, the member of the County Building Commission will have a financial interest in the County's purchase of his property. Further, as a member of the County Building Commission, the board member will have "voice, influence, and/or control" over the purchase and/or financing of the project. Therefore, the board member, who is selling the property, will have a prohibited interest in the County's purchase and financing of the project in violation ofW.Va. Code§ 61-10-15.

Accordingly, based upon the information which has been provided by the Requester, the Commission hereby finds that the County Commission's proposed purchase of property from a board member of the County Building Commission is prohibited under W.Va. Code§ 61-10-15. [3]

Additionally, with respect to the Requester's second question, the Commission hereby finds that bypassing the County Building Commission in the purchase of the property does not alleviate the potential conflict or the prohibited interest in the contract. Indeed, as the Requester notes, the County still intends to use the County Building Commission to finance the project. Further, the Requester should consult with the county prosecuting attorney and/or its legal counsel to determine whether it is legally authorized to bypass a building commission that it established for this very purpose.

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[1] The County Commission appoints the members of the Building Commission. W.Va. Code§ 8-33-3.

[2] Although the Ethics Commission need not evaluate the merits of the County Commission's decision to purchase the private property instead of the County-owned property to answer the questions posed, it does have some questions. In particular, the Requester has not provided information relating to the involvement of the Building Commission, if any, in the process. Additionally, the Request letter is silent as to the number of properties evaluated, and did not include a copy of the Option Agreement. The Requester, however, did provide the Commission a graph showing a comparison of the County's property and the private property.

[3] Due to the applicability of the stricter provisions of W.Va. Code§ 61-10-15, the Commission need not analyze or discuss the Ethics Act and/or its exception for part-time appointed board members. *See* W.Va. Code§ 6B-2-5(d)(1).

Finally, the Commission has reached this conclusion based upon the limited information which has been provided by the requester. If the County Commission has further information in support of this purchase, and/or believes the property is truly the only viable location/property in which to build the new 911 Center, then the County Commission may seek a Contract Exemption from the Commission.

The decision to seek a contract exemption is the County Commission's to make, not the Building Commission board member. As a result, the board member is prohibited from participating in any way in the decision. The Requester must decide whether it is in the County's best interest to pursue a contract exemption, and make its decision during a properly noticed public meeting. Therefore, the issue has to be placed on the agenda in a manner in compliance with the Open Governmental Proceedings Act, *i.e.* it needs to be specific enough to allow the public to know what is being considered. For example, it may read, "Consider requesting contract exemption from WV Ethics Commission to purchase property from Acme Company, owned by Building Commission Member Doe".

As with all Contract Exemptions, if the County Commission votes to seek an exemption, then the County must demonstrate to the Ethics Commission that it will experience undue hardship, excessive cost, or substantial interference with the operation of government if it is unable to purchase the private property of the Building Commission board member. *See* W.Va. Code§ 61-10-15. At a minimum, any contract exemption request should include information reflecting the totality of properties considered; the basis for its conclusion that the other property locations are unacceptable; the agenda/minutes of the County Commission meeting in which this purchase was discussed and approved; and a copy of the proposed agreement.

Conclusion

Based upon the foregoing, the Commission hereby concludes that the County Commission's proposed purchase of property from a board member of the County Building Commission creates an impermissible conflict as well as a prohibited interest in a public contract. *See* W.Va. Code§ 61-10-15. Further, the Commission finds that the Requester's proposed approach to bypass the Building Commission in the purchase of the property does not alleviate the conflict or financial interest.

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