

Contract Exemption 2023-04

Issued on November 2, 2023, by

The West Virginia Ethics Commission

Opinion Sought

The **Snowshoe Resort Community District** requests a Contract Exemption to lease office space from First Tracts Real Estate, a business that David Simmons, a District Board member, co-owns.

Facts Relied Upon By the Commission

The Snowshoe Resort Community District ("District 6") was established pursuant to the Resort Area District Act. [W. Va. Code §§ 7-25-1 through 27](#). It was created by the Pocahontas County Commission and is a public corporation. W. Va. Code § 7-25-7.

The Requester asserts:

The District provides infrastructure and essential services within its boundaries. The interests of all real property owners, whether it's undeveloped land, private homes, private apartments, or commercial property -- other than the profit-making operations of the resort operator, are of concern to the District as it seeks to meet its goals of developing the area. The District is similar to a small city that contains within its footprint the Snowshoe Ski Resort ("Resort"). The Resort is owned by Snowshoe Mountain, Inc., whose parent company is Alterra Mountain Company. The interests of the Resort are distinct from the District but align in providing a safe and thriving area that is attractive for guests and residents.

The District is governed by a seven member board of directors who represent the Resort and the property owners in the District. W. Va. Code § 7-25-10. The District board members are elected by the district property owners. *Id.* The Board employs a full-time manager and ranger, and four part-time staff members. The ranger position is currently vacant.

According to the Requester:

Due to the rural location of the District in Pocahontas County and the mountainous terrain, there is very little office space available either within or without the District or within five miles in all directions. The District has struggled to locate offices for the manager and a ranger that are secure and allow the District's business to be conducted.... Snowshoe Resort, Inc. owns most of the commercial space that could be and has been used for District offices in the past, but it has no current availability.

The District's current office space is inadequate, and the lease has expired. The office is located in the Linwood Center which houses a daycare facility; a small library; and a shared public space and restroom. The owner, Snowshoe Resort, is allowing the District to remain there temporarily on a monthly basis until suitable space is secured.

The Requester asserts that it has used due diligence in attempting to find suitable office space. Specifically:

The manager has reached out to all known potential landlords in the area including Snowshoe Resort, Silver Creek HOA, the other HOAs, The Shavers Fork Fire & Rescue and one other property owner along Cass Road. None of these owners have available space or are interested in renting to the District. Consequently, the proposed lease with First Tracts is the only viable alternative that will allow the District to conduct its business.

The Requester is seeking a contract exemption to lease office space from First Tracts Real Estate in which Mr. Simmons is a co-owner. The lease would be for two years at a monthly rate of \$2,200. The Requester explains the details of the space:

First Tracts owns much of the small amount of commercial space on Route 66, "Cass Road." Space in one of First Tracts' buildings has recently become available. The space is on the first floor, comprising approximately 1,350 square feet. The address is 502 Cass Road. The space would support four offices and a small conference room that adjoins one of the four offices. The space has two bathrooms. It is Wi-Fi-ready and has phone lines. The space, and the offices within, could be secured to meet the business needs of the District and the needs of a ranger department.

The Requester asserts the following undue hardship:

Without the exemption the District suffers an undue hardship in having no secure and private space where the manager can do the business of the District including both financial matters and meeting with residents and vendors. The ranger department needs to be able to secure property and interview people with reasonable confidentiality and, at present, cannot do either. There is no space for the board to meet in person. Its meetings have remained virtual, despite the dwindling Covid concerns. The manager lives in Marlinton and cannot conduct the District's business from home.

The manager needs to be present and reasonably close by to accommodate the District's residents and businesses. In addition, the rangers/public safety personnel need to be on site or close by. They need secure and private space.

Provisions Relied Upon By the Commission

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control Provided, however, That nothing herein shall be construed... to prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year. . . .

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

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 (j) of this section.

W. Va. Code § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental

agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

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

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 he or she may have any voice, influence or control....

W. Va. Code § 61-10-15(h) states, in pertinent part:

Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Opinion

Prohibited Contract

The Ethics Act prohibits an elected public official and businesses with which he or she is associated from having more than a limited interest in the profits or benefits of a contract over which he or she has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official or his or her associated business. W. Va. Code § 6B-2-5(d). Mr. Simmons, as co-owner of First Tracks, is associated with First Tracks and has more than a limited interest in the proposed lease. *Id.* He would also have direct authority or control over the District's contracts. See [Advisory Opinion 2013-25](#) (holding that elected conservation district officials have direct authority or control over landowner applications and are not entitled to the exception provided to part-time appointed board members in W. Va. Code § 6B-2-5(d)(1) because the conservation district officials are elected.)

Additionally, a county official must abide by the stricter prohibitions contained in W. Va. Code § 61-10-15, a separate criminal statute that imposes criminal penalties against county officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a contract over which he or she exercises voice, influence, or control. A person who violates this provision is guilty of a misdemeanor and may be removed from public office. A governing body may however seek an exemption from the Ethics Commission to contract with the official. W. Va. Code § 61-10-15(h).

The Snowshoe Resort Community District was created by the Pocahontas County Commission. Whether the board members of a resort district are subject to W. Va. Code § 61-10-15 is unclear. For purposes of this Contract Exemption, however, the Ethics Commission need not decide the issue today¹.

Contract Exemption

The Ethics Commission may grant an exemption from the prohibitions in the Ethics Act and W. Va. Code § 61-10-15 if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. The Requester asserts the following undue hardship:

Without the exemption the District suffers an undue hardship in having no secure and private space where the manager can do the business of the District including both financial matters and meeting with residents and vendors. The ranger department needs to be able to secure property and interview people with reasonable confidentiality and, at present, cannot do either. There is no space for the board to meet in person. Its meetings have remained virtual, despite the dwindling Covid concerns. The manager lives in Marlinton and cannot conduct the District's business from home. The manager needs to be present and reasonably close by to accommodate the District's residents and businesses. In addition, the rangers/public safety personnel need to be on site or close by. They need secure and private space.

The Ethics Commission finds that the Snowshoe Resort District used due diligence in attempting to find suitable alternative office space and has asserted sufficient undue hardship and substantial interference with the District's operations. Therefore, the Ethics Commission grants the Contract Exemption to permit the Snowshoe Resort District to lease office space from First Tracts Real Estate, a business with which David Simmons, a District board member, is associated, for two years at a monthly rate of \$2,200.

The District may not, however, make any capital improvements to the leased building. For example, the District may not replace the roof or install a new heating or cooling system.

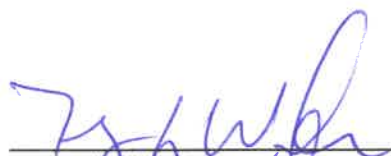
David Simmons must recuse himself from decisions, discussions, and votes relating to his contract and payment for services. He must follow the restrictions in W. Va. Code § 6B-2-5(d). For recusal to be proper, he must first fully disclose on the record his disqualifying interest and leave the room during the discussion, deliberation, and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that Mr. Simmons left the room

¹ W. Va. Code § 61-10-15(h) sets the same standard for granting a contract exemption under the criminal statute as W. Va. Code § 6B-2-5(d)(4) in the Ethics Act. If it is later deemed that the board members of a resort district are subject to W. Va. Code § 61-10-15, then this contract exemption is meant to apply.

during all consideration, discussion, and vote on the contract and payment for his services. W. Va. Code § 6B-2-5(j)(3).

This Contract Exemption is effective until December 31, 2025. The District must continue to use due diligence in securing alternative office space. If at the expiration of this Exemption, the District is unable to do so, it may request another contract exemption. A new contract exemption is only necessary if Mr. Simmons is still a Snowshoe Resort District member.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case and may not be relied upon as precedent by other persons or entities.



Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission