

CONTRACT EXEMPTION 2016-04

Issued on October 6, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Town of Rowlesburg** requests a Contract Exemption to allow it to accept a loan from its Mayor, Barbara Banister, in the amount of \$54,637.94.

FACTS RELIED UPON BY THE COMMISSION

The Town of Rowlesburg ("Town") has been required to update its sewer and storm water system due to the system allowing sewage to enter the Cheat River when it rained. The Town hired Beitzel Corporation to modify the system to alleviate the problem. The project cost the Town \$47,223.74. The Town paid Beitzel \$500 in July 2015 and \$500 in September 2015. While attempting to obtain a commercial bank loan to pay the balance, the Town received a notice from Beitzel that it was assessing late fees of \$7,914.20 to the total amount due. The Town states that the total balance owed is currently \$54,637.94.¹

Mayor Banister subsequently spoke to a manager at Clear Mountain Bank, who informed her that it would take at least five months for the Town to obtain a commercial loan from the bank. The Town states that it cannot wait an additional five months because Beitzel would assess additional late fees. The bank manager suggested that Mayor Banister and her husband could loan the Town the money.

Mayor Banister states she and her husband will lend the money to the Town and that the bank will act as the loan servicer. The bank manager set payments on the proposed loan at \$954.20 per month, an amount the Town reportedly can afford. The amount includes charges from the bank for servicing the loan. Mayor Banister states that she and her husband understand that they may not benefit in any way from lending money to the Town, and that the servicing charges will not benefit her or her husband.

PROVISIONS RELIED UPON BY THE COMMISSION

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

- (1) 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

¹ The balance owed based on the figures provided totals \$54,137.94. However, the Town provided minutes from a September 12, 2016, special meeting that reflects the amount due to Beitzel Corporation is \$54,637.94.

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.

. . .

- (4) 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.

158 CSR 8-3 states in relevant part:

3.1. A limited interest is:

- a. An amount not to exceed \$1,000.00 in the gross revenues in a public contract or contracts per calendar year. The \$1,000.00 limit is applicable to gross revenues received through a public contract by a public official or employee, an immediate family member thereof or a business with which the public official or employee or immediate family member is associated.

. . .

- 3.2. If a public official or employee has more than a limited interest in a public contract, then such an interest is only permissible if the public agency with whom the public official or employee works or serves seeks and receives a contract exemption in accordance with W. Va. Code § 6B-2-5(d)(4)). This requirement does not apply to part-time appointed officials who, in accordance with the Ethics Act, may have an interest in a public contract if they recuse themselves from the decision-making process.

ADVISORY OPINION

The Ethics Commission previously has considered a Contract Exemption request in the form of a proposed loan from Mayor Banister to the Town of Rowlesburg. In Contract Exemption 2007-05, the Commission held that a proposed interest-free loan from the Mayor constitutes a prohibited financial interest under W.Va. Code § 6B-2-5(d)(1). In its analysis, the Commission stated that “[n]otwithstanding the fact that the Mayor will not realize any profit from making an interest free loan to the Town, by loaning money to the Town, the Mayor becomes the Town’s creditor.” *Id.* The Commission further reasoned:

If the Town were ever in a situation where it lacked funds to cover all of its outstanding debts, the Town would be in a position of deciding among its creditors—including its Mayor—which to pay. Further, if in the unfortunate event the Town had to declare bankruptcy, the Mayor would be competing with other creditors for whatever money was available for disbursement.

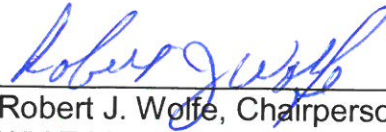
Id. The Commission held that W.Va. Code § 6B-2-5(d) “prevents a Town from accepting even an interest free loan from its Mayor.”

The Ethics Act provides, however, that the Ethics Commission may grant a municipality an exemption from this prohibition, if the agency demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation. W.Va. Code § 6B-2-5(d)(4). In Contract Exemption 2007-05, the Commission granted the Town of Rowlesburg an exemption permitting it to borrow \$2,000 from Mayor Banister and her husband at no interest. The Commission found that “the Town ha[d] demonstrated its attempts to obtain money from other sources[,]” and additionally took “administrative notice that the Town would be unable to obtain an interest-free loan from a bank or other commercial lender.” It held that the loan must be unsecured and that Mayor Banister must be recused from any matters regarding approving and repayment of the loan. *Id.*

In the instant request, the Town states that it cannot wait an additional five months to secure a commercial loan from the bank for fear that Beitzel Corporation will add additional charges to the \$54,637.94 already owed. The Town does not appear to have approached any commercial lender other than Clear Mountain Bank to determine whether it must wait five months to obtain a commercial loan. However, as in Contract Exemption 2007-05, the Commission takes administrative notice that the Town would be unable to obtain an interest-free loan from a bank or other commercial lender.

In conclusion, the Ethics Commission grants the Town of Rowlesburg an exemption from the prohibition of W.Va. Code § 6B-2-5(d) permitting it to borrow \$54,637.94 from Mayor Barbara Banister and her husband at *no interest*. The loan must be unsecured, and Mayor Banister must properly recuse herself from any matters regarding approval or repayment of the loan.

The Ethics 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.

A handwritten signature in blue ink, appearing to read "Robert J. Wolfe", is written over a horizontal line.

Robert J. Wolfe, Chairperson
WV Ethics Commission