

## **Advisory Opinion 2022-04**

**Issued on February 3, 2022, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **County Commissioner** asks whether he may vote on a tax incremental financing (TIF) request from a corporation that has financial ties to his employer.

### **Facts Relied Upon by the Commission**

The Requester, who is a county commissioner, is privately employed by a solely-owned limited liability company (LLC). The Requester is not an officer or director of the LLC. The LLC has a contract with a resort to provide security services for it. The Requester is not an employee of the resort, but is working under the LLC's contract as the head of security at the resort. He is not an owner, director, or officer of the resort.

A corporation is asking the County Commission to approve a tax incremental financing (TIF) district to facilitate residential and commercial development of property it owns in the County. The corporation is believed to be solely owned. The Requester is not an employee, director, or officer of the corporation. The resort, at which the Requester serves as head of security through the LLC, is situated outside of the proposed TIF district.

If the TIF is approved and created, then the corporation will be subject to the terms of the TIF agreement with the County as a condition of receiving the TIF revenue for development within the TIF district. The TIF financing would not be used for the resort.

To the best of the Requester's knowledge, the LLC that employs him is not the parent company or a subsidiary of the corporation that is requesting the TIF. However, the corporation's owner has financial ties to the owner of the LLC that employs the Requester and to the resort. Specifically, the owner of the corporation solely owns or has an ownership interest in the resort through other companies. Furthermore, the Requester believes that the owner of the corporation also owns another business that employs the LLC owner.

### **Code Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b)(1) states, 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his

or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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

(1) In addition to the provisions of § 61-10-15 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:

.....

(3) 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 R. § 158-8-2 provides:

Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

W. Va. Code R. § 158-8-4 provides:

The prohibition of W. Va. Code § 6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.

Public 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-2-5(j) states, in relevant part:

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, 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.

....

W. Va. Code § 61-10-15 provides, in relevant part:

(a) It is unlawful for 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 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.

## **Advisory Opinion**

### *Tax Increment Financing (TIF)*

The West Virginia Tax Increment Financing Act (“TIF Act”), at W. Va. Code §§ 7-11B-1 through 7-11B-30, authorizes county commissions and larger municipalities “to raise revenue to finance capital improvements and facilities that are designed to encourage economic growth and development in geographic areas characterized by high levels of unemployment, stagnant employment, slow income growth, contaminated property or inadequate infrastructure.”<sup>1</sup> County commissions and the governing bodies of Class I, Class II or Class III municipalities, upon their own initiative or upon application of an agency or a developer may propose a development district and designate its boundaries. W. Va. Code Ann. § 7-11B-7(a). The Legislature has found that TIFs serve a public purpose. W. Va. Code § 7-11B-2.

The revenue generated by a TIF is used by a county or municipality to pay for approved projects in the district.<sup>2</sup> Examples of projects include building access roads and installing sewer or water lines. A county or municipality may use the TIF funds to either directly pay for projects or to make bond payments if bonds are issued by the county or taxing body to finance the projects in the TIF district. A developer must comply with the terms of the TIF agreement as a condition of the TIF funds being expended for improvements in the TIF district. A developer for property in a TIF district benefits by virtue of the public infrastructure projects.

### *Public Contract Provisions in the Ethics Act and W. Va. Code § 61-10-15*

Both the Ethics Act and W. Va. Code § 61-10-15, a criminal misdemeanor statute that applies to certain county officials and employees, including county commissioners, prohibits the Requester from being a party to, or having a financial interest in, a public contract over which his public position gives him control.<sup>3</sup> The Commission must determine, therefore, whether 1) a TIF is a public contract and, if so, 2) the County Commissioner has a financial interest in the TIF contract.

In Advisory Opinion 2003-15, the Commission held that the approval of a TIF project by a county commission created a public contract.<sup>4</sup> If the TIF district is approved and created, then the corporation developing the property within the TIF district must comply with the terms of the TIF agreement as a condition of the TIF funds being expended for improvements in the TIF district. **The Ethics Commission finds that a TIF agreement is a public contract.**

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<sup>1</sup> See W. Va. Code § 7-11B-2(a).

<sup>2</sup> PROPERTY TAX INCREMENT FINANCING IN WEST VIRGINIA, A GUIDE FOR COUNTIES AND CLASS I AND II MUNICIPALITIES, W. Va. Development Office, West Virginia Department of Tax and Revenue, 4 (2003).

<sup>3</sup> W. Va. Code § 6B-2-5(d)(1) (containing the Ethics Act public contract restrictions).

<sup>4</sup> The Ethics Commission held that it would violate W. Va. Code § 61-10-15 to approve the project if one of the County Commissioners owned property within the TIF boundaries. The Ethics Commission also held that this same Code provision would be violated because one of the county commissioner’s spouses was employed by the business proposing the TIF. The Commission did not analyze whether the exemption in W. Va. Code § 61-10-15(e) for salaried employees of companies who do not have an ownership interest in the business and received no additional pay by virtue of the contract applied.

The Ethics Commission must next determine whether the Requester has a financial interest in the TIF contract for purposes of the Ethics Act or W. Va. Code § 61-10-15. In Advisory Opinion 2021-21, the Ethics Commission analyzed whether a board of education (BOE) member, who owns a construction company, had a prohibited financial interest in a public contract between the BOE and a recreation complex. The BOE owned and leased buildings in the recreation complex, and the BOE member performed private work for the recreation complex. The BOE did not fund any of the county commissioner's private work projects. The Commission held that the BOE member did “not have a financial interest in the contracts between the BOE and the Recreation Complex because the BOE member does not perform work for the Recreation Complex, as a contractor or subcontractor, on projects which are funded wholly or in part by the BOE.”

Based upon the plain language in the Ethics Act and W. Va. Code § 61-10-15, and the holding in Advisory Opinion 2021-21, the Ethics Commission finds that the Requester does not have a prohibited financial interest in the TIF contract because the Requester:

- (1) Does not own property in the TIF district;
- (2) Is not a party to the TIF contract;
- (3) Has no ownership interest in either the LLC which employs him or the corporation requesting the TIF district, and
- (4) Is not employed by the corporation applying for the TIF district.<sup>5</sup>

While the LLC which employs the Requester and the resort where he works have financial ties to the owner of the corporation requesting the TIF, the Ethics Commission finds that the financial interrelationships between these entities and persons does not give the Requester an interest in the profits or benefits of a public contract over which he exercises voice, influence, or control.<sup>6</sup>

**The Ethics Commission finds that the County Commissioner does not have a prohibited financial interest in a TIF district, for purposes of the Ethics Act or W. Va. Code § 61-10-15, by virtue of his employment by an LLC as the security officer at a resort. While both the resort and the LLC have financial ties to the owner of the corporation requesting that the TIF district be approved, the Ethics Commission finds that the financial interests of these businesses do not give the Requester a financial interest in the profits or benefits of a public contract arising**

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<sup>5</sup> The Ethics Act public contract restrictions only apply to a public official or public employee if he or she or an immediate family member is 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-2-5(d) and W. Va. Code R. § 158-8-4

<sup>6</sup> In Advisory Opinion 2013-13, the Ethics Commission held that because of the restrictions in W. Va. Code § 61-10-15, that a county may not lease a county marina to the business partner of a county commissioner even though their business was not involved in the marina lease. The Commission finds that the holding in Advisory Opinion 2013-13 is not controlling in the instant case as the county commissioner was a *business partner* [emphasis added] of a person who had an interest in a county lease. In the present case, the county commissioner is merely an employee of a business and does not own any businesses with the various persons and entities involved.

from the creation of a TIF district. W. Va. Code § 6B-2-5(d), or W. Va. Code § 61-10-15.

### *Voting*

The Ethics Commission must determine whether the voting restrictions in the Ethics Act, at W. Va. Code § 6B-2-5(j), require the Requester to recuse himself from voting on matters affecting the financial interests of the corporation which has financial ties to the LLC which employs him. The relevant provision in the voting restrictions states:

(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.

The term “associated” with a business for purposes of applying the voting restrictions in the Act, is a business in 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.” W. Va. Code § 6B-2-5(j). In applying this definition of “associated,” the Ethics Commission finds that the Requester is not associated with the corporation seeking approval of a TIF district.

In Advisory Opinion 2021-21, the Ethics Commission held “that the mere possibility of gain to the BOE member when voting on matters affecting his customers is too remote to be a financial interest for purposes of the voting restrictions in the Ethics Act.” Similarly, here, the Ethics Commission finds that the mere possibility of gain to the Requester is too remote to be a financial interest for purposes of the voting restrictions in the Ethics Act. **The Ethics Commission holds, therefore, that the County Commissioner may vote on the TIF district approval request of a corporation that has financial ties to his employer.**<sup>7</sup>

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.*

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<sup>7</sup> In contrast, in Advisory Opinion 2019-22, the Ethics Commission held that an airport authority member may not vote on matters affecting the parent company of her husband’s employer. This case is different as the LLC which employs the Requester is, to the best of the Requester’s knowledge, neither a subsidiary or parent company of the corporation requesting approval of the TIF district.

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission