ADVISORY OPINION NO. 2011-09

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Hospital** asks whether it may accept unsolicited offers of property and/or services from its Board Members.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a County Hospital. It seeks to build a new hospital. A Board Member made an unsolicited offer to donate property for this purpose. If the Hospital accepts the donation of property, the Board Member is eligible to claim a tax deduction.

The Hospital retained an engineering firm to prepare a site study on the various sites it was considering for the new hospital. Various sites were evaluated, including the property offered by the Board Member. The report states that there are no known environmental hazards on the property. It was reported in the local paper that the Board Member has offered to give her property to the hospital. This property has not been listed for sale nor are there any liens on it. At this time, the hospital is negotiating to purchase another piece of property. If it is unable to reach an agreement to purchase that piece of property, then it inquires whether it may accept the property offered by the Board Member.

Another Board Member owns an equipment company. This Board Member has offered to allow his equipment to be used, at no charge, for site preparation work. It is unknown whether he may claim a charitable deduction for the donation of these services.

Both Board Members made these offers on their own accord; they were not solicited.

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. 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....

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she 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 or she may have control....

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....

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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 Commission finds that the donation of property or services does not constitute a contract subject to the limitations in the Ethics Act and W.Va. Code § 61-10-15.[1] The Commission cautions that the donation must in fact be a gift; the property or services may **not** be provided at cost. *See* Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949) finding that the donation of services at cost constituted a violation of W.Va. Code § 61-10-15 which resulted in the removal of the school board member. Moreover, there may be not other financial conditions tied to the transaction. For example, a board member may not donate property with the condition that the public agency bears responsibility for correcting any known environmental hazards or satisfying any liens on the property; provided, that, a governing body may accept property in those circumstances if an independent evaluation concludes that the overriding benefit is to the public agency and, prior to accepting the property, it seeks and receives permission from the Ethics Commission.

Next, the Commission must consider whether the donation of property or services constitutes a violation of the private gain prohibition in the Ethics Act. W.Va. Code § 6B-2-5(b). In regard to donating property, there are benefits to the donor. Donors may take a charitable tax deduction. Even if the donor elects not to take a charitable deduction; still, other benefits exist. For example, if a property owner is unable to sell property, if they are able to give it away, they are relieved of the burden of paying property taxes and insurance.

Despite the potential benefits of donating property, the Commission finds that it does not constitute the use of public office for private gain if the governing body takes the following steps: (1) notifies the public through a public advertisement that a board member has offered to donate property; (2) in the advertisement state that the board is providing other property

[1] This finding modifies A.O. 95-09 to the extent that the Commission implied in its holding that the donation of property constitutes a public contract. This opinion modifies A.O. 95-09 by clarifying that the donation of property or services does not constitute a public contract for purposes of the limitations in the Ethics Act or W.Va. Code § 61-10-15. This finding applies only to the **donation** of property; not the **leasing** of property, even if it is only for a de minimis amount. The leasing of property for a de minimis amount is subject to a different analysis.

owners this same opportunity; (3) includes a disclaimer in the advertisement that the governing body is not soliciting citizens for the offer of free property and no citizen should feel compelled to make such an offer. The board may, in its discretion, state that it is providing citizens this opportunity in accordance with guidance it sought and received from the West Virginia Ethics Commission to ensure transparency and fairness in the property acquisition process [2]; and, (4) evaluates and makes a final decision during a properly noticed public meeting.

During this process, the affected board member/potential donor must be recused from the decision-making process. For recusal to be proper under the Ethics Act, she must disclose her interest and excuse herself from participating in the discussion and decision-making process by physically removing herself from the room during the discussion and vote on the matter. Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that she left the room during all consideration, discussion and vote on the item under consideration.

In regard to a board member donating services or the use of equipment, the Commission finds that it is not necessary to take the steps outlined above in regard to offering this opportunity to other citizens. Even if the donation of services, physical labor or use of equipment qualifies the donor for a tax break, the Commission finds there is less room for mischief for this type of donation, as opposed to the donation of property, real or personal.

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.

R. Kemp Morton, III Chairperson

[2] The Commission takes this opportunity to remind governing bodies that, generally, they may not solicit for donations of property or services as public agencies may only solicit for charitable purposes. *See* A.O. 2007-15 (a County Solid Waste Authority may not solicit donations for the purpose of making site improvements) and Title 158, Series 7 of the Code of State Rules. The present situation is unique as the citizens are being placed on notice to avoid the appearance of impropriety.