ADVISORY OPINION NO. 2011-14

Issued On November 3, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Candidate for County Assessor** asks whether he may, if elected, continue his career as the owner and broker of a real estate business.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the owner and broker of a real estate business that operates in the county where he resides and in surrounding counties. He does not employ any agents. He uses a multiple listing service for real property.

A County Assessor is an elected position responsible for assessing all property within the county each year. *See* W. Va. Code § 11-3-1. The Assessor employs various individuals to assist in assessments and other statutory duties of the office.

If elected, the Requester desires to continue operating his real estate business in the county in which he would serve. He also wants to keep his real estate license active.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (1) No full-time official may seek ... to purchase, sell or lease real or personal property to or from any person who:
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> > (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or
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> > (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

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The Ethics Act prohibits public officials from seeking to purchase, sell or lease real or personal property to or from any person who is, or has been within the preceding twelve months, subject to their personal regulatory authority or the regulatory authority of a subordinate. W.Va. Code § 6B-2-5(h)(1). The Requester asks whether the Ethics Act prohibits him from continuing to engage in his real estate business if he is elected.

Whether Assessors may engage in secondary business activities is not a matter of first impression for the Commission. In Advisory Opinion 1996-52, a County Assessor asked whether he was permitted to moonlight doing land survey work in his county. The Commission found that County Assessors annually take regulatory action on persons who own land located in their counties. The Commission further stated:

> This regulatory action is taken either personally or through subordinates who are employed by the Assessor. For this reason, the requester may not be employed by any person who owns land located in that County.

The Assessor is statutorily responsible for annually assessing each property. *See* W. Va. Code § 11-3-1. This assessment is the basis for the levy of a property tax, and constitutes regulatory action taken by the Assessor.[1] The Assessor, either through her/his actions or those of her/his subordinates, exercises regulatory authority over all citizens and businesses in the county where s/he serves. As the elected official charged with the administration of the Assessor's Office, the Assessor is ultimately responsible for all regulatory actions taken by the office. Therefore, the Commission hereby finds that W. Va. Code § 6B-2-5(h) prohibits an elected county Assessor from owning and operating a real estate business, or being employed by a real estate business or other similar business, when the business activity or employment involves the purchase, sell or lease of property within the county in which s/he serves.

Indeed, in its findings and declaration of intent, the Legislature expressly held:

> The Legislature hereby finds that the holding of a public office ... is a public trust. Independence and impartiality of public officials ... are essential for the maintenance of the confidence of our citizens in the operation of a democratic government. The decisions and actions of public officials ... must be made free from undue influence, favoritism or threat, at every level of government. Public officials ... who exercise the powers of their office ... for personal gain beyond the lawful emoluments of their position or who seek to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government.

W. Va. Code § 6B-1-2(a).

Further, at least two other states impose similar restrictions. In Kentucky, the Executive Branch Ethics Commission ruled that Property Valuation Administrators, their deputies and their other employees were prohibited from buying and selling real estate for financial gain in the counties in which they are employed. *See* Advisory Opinions 10-4, 98-11, 05-22, and 09-14. They were also prohibited from performing appraisals or serving as sales brokers. *See* Advisory Opinion 06-29.

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[1]The regulatory action includes not only the increase or decrease of property value, but also the consideration of exoneration requests, reappraisals, and homestead exemptions.

The Attorney General for the State of New York was asked whether an appointed town assessor who engages in the business of home construction, necessitating that the assessor appraise houses he constructs and subsequently sells, creates a prohibited conflict of interest, and wrote: "We conclude that a local government should include in its code of ethics standards that define and prohibit private conduct in conflict with official duties. Where substantial conflicts are inevitable, a town should act to prohibit assessors from engaging in the business of home construction in the town." 1984 N.Y. Op. Atty. Gen. (Inf.) 86, 1984 WL 186562 (N.Y.A.G.).[2]

This prohibition does **not**, however, apply to purely personal transactions. For example, the Requester may buy, sell or lease a personal home. *See* W. Va. Code § 11-3-17 (authorizing the assessor to assess the property of deputy assessors, and a deputy assessor to assess the assessor's property). Instead, the Ethics Act prohibits an assessor from engaging in real estate transactions for commercial purposes, either through a business such as the Requester's, or more informally by buying, selling or leasing property on the side.

In light of the foregoing, the Commission hereby finds that the Requester, if elected, may not seek to purchase, sell or lease real property to or from any person in the county in which he serves. Specifically, the Requester, if elected, may **not** continue his career as the owner and broker of a real estate business within the county where he serves.[3]

Further, the Requester has indicated that, if elected, he does not want to give up his real estate license. Nothing in the Ethics Act requires the Requester to do so, but other laws, policies or regulations that the Ethics Commission lacks jurisdiction to interpret may apply. The Requester should consult the Prosecuting Attorney as well as the appropriate real estate licensing board for this determination.[4]

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.,* 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, Chairperson

[2] In another New York opinion, the State Board of Equalization and Assessment determined that a town assessor may not accept a contract to conduct appraisals for the county due to his pecuniary interest in the contract. 1973 WL 20599 (N.Y.Bd.Equal). & Assoc.).

[3]The Requester may continue to do business in other counties so long as he does not: use his official position in any way that would give him an advantage; conduct his business on county time; or use county resources (including staff) to conduct his private real estate business.

[4]The Ethics Commission additionally makes no finding regarding whether an elected full-time assessor may have secondary employment and/or a business. *See* W. Va. Code § 7-7-4(8).