

Advisory Opinion 2021-14

Issued on June 3, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether a Commissioner may vote to modify the County's Comprehensive Plan that governs the zoning of property in which the Commissioner has an ownership interest.

Facts Relied Upon by the Commission

The County has a Corridor Management Plan ("Plan") component to its Comprehensive Plan. The Plan governs the development and zoning of real property adjacent to a portion of a U.S. route located in the County but outside of the corporate limits of any municipality. The Plan governs real property that is situated within 1,000 feet of the U.S. route or which is visible from the route, whichever is greater.

The Commissioner is the president and 50 percent stockholder of a business that owns real property in the Plan area. The property is a 54-acre vacant tract. The current Plan zones the business's property as rural residential which precludes the use of the property for commercial purposes.

The County Planning Commission is considering whether to modify the Plan which could impact future requests to change the zoning of property in the County, including the property owned by the Commissioner's business. The current Plan requires that a zoning change request may only be granted by the Planning Commission after a series of evaluations are conducted on the property. The Requester asserts that modification of the Plan could make it easier to change the zoning of any parcel of land currently zoned rural residential to develop their property.

The County Commission will vote to accept, reject, or modify the Planning Commission's recommendations regarding the changes to the Plan.

The Requester estimates that there are more than 100 other parcels of real estate within the area subject to the Plan, and as such there are a significant number of similarly-situated individuals and businesses. The other parcels vary in size from one or two acres up to close to 100 acres. Some parcels are owned by one or more individuals and some parcels are owned by companies.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) 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. . . .

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.

(2) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses.

. . .

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

Advisory Opinion

Pursuant to the Ethics Act, public officials may not vote on or participate in deliberations on a matter in which they have a financial interest. W. Va. Code § 6B-2-5(j). Even if a public official has a financial interest under W. Va. Code § 6B-2-5(j), recusal is not mandated when the public official is affected as a member of a class of five or more similarly situated persons or businesses. W. Va. Code § 6B-2-5(j)(2)(A).

The Requester asserts that the Commissioner has a financial interest in modifying a Corridor Development Plan that governs a tract of property his business owns. The Commission must therefore consider whether participating in and voting on matters related to modifying the Plan would affect the Commissioner uniquely as opposed to affecting him as a member of a class of five or more similarly situated persons or businesses.

In Advisory Opinion 2016-13, the Ethics Commission found that a city council member, who also served on the planning commission, did not have a unique interest in the development of the hillside near her home because she was similarly situated to approximately 700 other homeowners. The Ethics Commission held that she could vote on and fully participate in all matters relating to development of the hillside as a member of a class.

In Advisory Opinion 2017-19, the Ethics Commission held that planning commission members whose businesses use signs are not required to recuse themselves from matters related to the sign ordinance because they fall within a class of five or more similarly situated businesses that would not be uniquely affected by changes to the sign ordinance.

In Advisory Opinion 2018-09, the Ethics Commission held that a city council member could vote on the city's proposed purchase of property that was adjacent to the council member's residence because approximately 28 other residences were also adjacent to the property. Similarly, in Advisory Opinion 2019-18, the Ethics Commission held that a mayor may vote on matters affecting a proposed hotel development project near properties he owns because he is a member of a class of five or more similarly situated persons who own property near the hotel project.

The Ethics Commission finds that the Commissioner is a member of a class of five or more similarly situated persons and therefore he may vote on matters relating to modifying the Corridor Development Plan of the County's Comprehensive Plan that governs the zoning and use of a tract of property his business owns.

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 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 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