

Advisory Opinion 2021-23

Issued on November 4, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether it may use American Rescue Plan funds from the Federal government to help fund a waterline extension project given that a private developer may uniquely benefit from the project.

Facts Relied Upon by the Commission

A private developer has requested that the County Commission appropriate some of its federal American Rescue Plan “ARP”¹ funds to the County Public Service District for a waterline extension project to his proposed cabin resort development. The developer states that the cabin resort is not feasible without potable water. The waterline service would run along a public road and would be available to two other commercial landowners in the area. One of these properties has a former restaurant and motel on it. A cable company is being operated on the other property. The developer expects all three properties to benefit from the waterline extension project. Each property owner would have the option to run their private lines to the connection points on the public road.

The Commission has tentatively agreed to contribute up to \$264,000 from its American Rescue Plan funds. The total cost of the water extension project is approximately \$1 million. Other funding has been requested from the West Virginia Regional Intergovernmental Council and the West Virginia Department of Commerce. The developer expects the waterline extension project to be fully funded from public sources.

The County Commission and the developer assert that the cabin resort will provide a substantial economic benefit to local businesses and more tax revenue to the county. They assert that the area needs overnight accommodations and other amenities to support its burgeoning outdoor trail riding industry. The developer submitted a letter of support for his cabin resort from the Executive Director of the trail system, in which the Director states that the trail system has over \$40 million in annual economic impact which “will only be fully realized when investments such as yours come to fruition and overnight guests are able to stay in the county.”

The County Commissioners and the developer assert that no financial or familial relationships exist between the developer and any of the Commissioners.

¹ The ARP was enacted to address the needs of Covid - 19 pandemic and its negative economic impact. <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>

The issue presented is whether it would violate the Ethics Act to use the ARP funds for this project given that a private developer may uniquely benefit from the project.

Code Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) provides, 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.

Advisory Opinion

First, the Commission's authority is limited to questions involving the application of the Ethics Act. Here, the pertinent provision of the Act, the "private gain" provision, prohibits the County Commissioners from using their public office or prestige of office for the private gain of another person. W. Va. Code § 6B-2-5(b)(1). The Commission has repeatedly stated: "In determining whether an expenditure of public funds violates the [private gain provision of the] Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure." Advisory Opinion 2018-02. In this case, the County Commission must also comply with the federal mandates in the ARP Act and associated federal rules. The Ethics Commission does not have the authority to opine whether the subject project is eligible for ARP funds. This Opinion, therefore, is limited to whether providing funding for the requested waterline extension, which may uniquely benefit one developer, would violate the Ethics Act.

The Ethics Act permits the expenditure of public funds when there is a legitimate government purpose for the expenditure even if there is also private gain to an individual. For example, in Advisory Opinion 2020-14, the Commission held that "it does not violate the Ethics Act for a Sheriff's Office to use public funds to install a fence on a K-9 handler's private property for the purposes of protecting the public and the K-9 and for liability purposes subject to the limitations outlined herein."

Further, the Commission has specifically found that economic development or promoting tourism provides an overriding public benefit that justifies private gain to an individual. In Advisory Opinion 2021-05, for example, the Commission held that a county may give "free advertising to hotels on the County's tourism website for the

purpose of promoting tourism in the region [which] does not constitute use of office for private gain as the Legislature has authorized the expenditure of the funds to promote tourism and the expenditure is for a public purpose.”

Also, in Advisory Opinion 1995-05, the Commission found that a government official could write a letter to state businesses asking them to participate in a private book publishing project. The Commission found that promoting a private, profit-making venture did not violate the Ethics Act's prohibition against use of office for private gain because the book would also “promote and increase economic development in West Virginia.”

In Advisory Opinion 1995-28, the Commission found that it would not violate the private gain provision for a public official who was in charge of economic development to invite selected persons for a complimentary round of golf and cook-out at a new course because the purpose of the outing was to promote tourism and economic development.² The Commission also stated, in Advisory Opinion 1995-28, “The determination of whether [an] activity will actually benefit the state by promoting tourism and economic development is an issue for the [agency] to resolve.”

Based on the above Advisory Opinions, the Ethics Commission holds that if the County Commission determines that building the proposed waterline extension project benefits the County by promoting tourism or economic development, then using American Rescue Plan funds for the project would not violate the Ethics Act even if the developer may uniquely benefit from the project.

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
WV Ethics Commission

² The Ethics Commission, in Contract Exemption 2017-04, permitted the West Virginia Development Office to use state funds to pay the registration fees for its employees to attend a nationwide business summit at The Greenbrier. The contract with The Greenbrier would have been prohibited, under the prohibited contracts provision of the Act, because The Greenbrier is owned by the Governor. The Commission authorized the exemption, in part, because the business summit would be used to “advertise and market the state’s resources to businesses and representatives” statewide in a single location.