

ADVISORY OPINION NO. 92-40

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 1, 1992

GOVERNMENTAL BODY SEEKING OPINION

A City Building Commission

OPINION SOUGHT

Is it a violation of the Ethics Act for a City Building Commission to contract with local lending institutions in which various Commission members have limited interests?

FACTS RELIED UPON BY THE COMMISSION

The City Building Commission is involved in, or expects to be involved in, three major construction projects in the City. These projects may include a new city hall, a new federal building and a new downtown campus for a public college. Any or all of these projects may be financed in whole or in part by a loan or loans from a local bank or a group of local banks, which would be evidenced by revenue bonds of the Building Commission. The maximum amount expected to be borrowed for any one project is \$10,000,000. No project and financing will be dependent upon any other project.

The specific details of financing are not firmly established. Although it is the current plan of the Building Commission to finance the new city hall with a loan from a federal agency, local bank financing is contemplated as a backup or alternate source of funding should the federal loan not be feasible. Local financing might be obtained in conjunction with funding from the federal agency, either through a joint financing or as interim construction financing. As an alternative to the issuance of bonds for the federal building project, the Building Commission may contract with a private developer that would arrange for financing directly, including a loan or loans from one or more local banks.

In the event borrowing through one or more local banks by the Building Commission is necessary, the Commission intends to solicit proposals from such local banks, individually or as groups, to obtain the most favorable interest rates and other terms available. However, if several banks are required because of the size of the loan, competitive bidding may be difficult or impossible to accomplish. Moreover, solicitation of proposals may not be possible in connection with the college facility, whether one or more banks fund the loan, because the underlying obligor will not be the Commission.

The anticipated source of repayment of the loan for the city hall will be annually appropriated general revenues of the City. The anticipated sources of payment of the loans for the federal building and the college facility are rentals from the federal government and the college, respectively. The moneys needed by the college to pay rentals are currently anticipated to be derived from student fees, appropriated state funds and/or private grants.

The management and control of the Building Commission is vested in a five member Board appointed by the City Council. Members of the Building Commission receive no compensation for their services, but are reimbursed for reasonable and necessary expenses actually incurred in the discharge of their duties. The members of the Board are responsible for making policy and take official action with respect to contracting for goods or services and other activities where the official action has an economic impact of greater than a de minimis nature on the interest or interests of a person.

The Chairman of the Building Commission is the president of a local bank, is a member of the bank's Board of Directors and owns .00015% of the outstanding shares of stock of the parent holding Company of that bank.

A second member of the Building Commission owns .01148% of the outstanding shares of stock of the same parent holding Company of a Bank. This member also owns .00051% of the outstanding shares of stock of the parent holding Company of a second area bank and, further, owns .07942% shares of outstanding stock of a parent holding company of a third area bank.

The spouse of the third member of the Building Commission owns .01541% of the outstanding shares of stock of the parent holding company of a local bank. This spouse resides with this Board member.

None of the members of the Building Commission own stock in the area banks since each parent holding company of the various banks owns all of the stock of each individual bank.

Finally, the various Board members and immediate family members or businesses with which they are associated maintain bank accounts at local banks. Any interest as creditors does not exceed ten percent of the total indebtedness and they likely would not have interests exceeding \$30,000 in the profits or benefits of any future public contract.

Except as set forth above, no Board member or member of the immediate family of any Board member is associated with or has an interest in any of the potential transactions at issue.

In addition to his banking expertise, the Chairman of the Board is a certified public accountant. No other member of the Board of the Building Commission has a financial or accounting background, and it was the hope of the Building Commission that the Chairman's education, experience, skills and abilities could be used in assessing the various financial arrangements of the Building Commission. Moreover, another member of the Building Commission is an attorney, and his education, experience, skills and abilities could likewise be used in connection

with the various projects and financing. Additionally, if any Bank is deemed ineligible to bid on any or all of the proposed loans, it would reduce the possible competition, which could increase the cost of the borrowing for the proposed projects.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official 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...

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no elected or appointed public official 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 such official or employee may have direct authority to enter into, or over which he or she may have control...Provided, however, that nothing herein shall be construed to prohibit...a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code §6B-2-5(d)(2) states in pertinent part that...an elected or appointed public official...or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

- (i) not exceeding ten percent of the partnership or the outstanding shares of a corporation; or
- (ii) not exceeding thirty thousand dollars interest in the profits or benefits of the contract;

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Public Contract

Pursuant to WV Code §6B-2-5(d)(1) public officials may not have more than a limited interest in the profits or benefits of a public contract over which they have direct authority or control. Obviously the Board members of the City Building Commission have authority and control over all public contracts awarded by the Building Commission. This would include financing and loan agreements.

However, according to the information provided in the request letter, none of the members of the Building Commission own more than ten percent of the outstanding shares of stock in the individual parent holding companies of the area lending institutions which may conduct business with the Building Commission. Also, considering the diminutive percentage of shares owned by each individual Building Commission member it is unlikely that any member would have a pecuniary interest which would exceed thirty thousand dollars in the profits or benefits of a public contract.

Therefore, it would not be a violation of the Ethics Act for the City Building Commission to contract with local lending institutions in which various Commission members have such limited interests.

Further, pursuant to WV Code §6B-2-5(d)(1), part-time appointed public officials may enter into a contract which the officials have direct authority to enter into or over which they may have control when such officials have been recused from deciding or evaluating and excused from voting on such contract and have fully disclosed the extent of such interest in the contract.

If a particular Building Commission member is determined to have a pecuniary interest of more than \$30,000 in the profits or benefits of the public contract, such member should seek to be recused from deciding or evaluating and excused from voting on such contract and fully disclose the extent of his interest in the contract as outlined above.

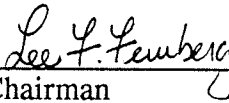
Personal Conflicts

WV Code §6B-1-2(c) provides that part-time public officials should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal". The Commission determines in this instance that the Building Commissioners' potential pecuniary interest in the profits or benefits of the public contract is not sufficient to be considered "personal" as the term is used in this section.

Private Gain

Pursuant to WV Code §6B-2-5(b)(1) public officials may not use their public office or its resulting prestige for their own private gain or for the private gain of another. In this instance, the Ethics Commission does not consider voting by Building Commission members on proposed transactions in which they have a minuscule pecuniary interest sufficient to constitute a per se use of public office for private gain. If the proposed transactions are justifiable by objective criteria then there would be no violation of WV Code §6B-2-5-(b)(1).

The Building Commission may wish to solicit proposals from lending institutions outside the local area to demonstrate that a good faith effort has been made to acquire the most favorable rates and terms available.


Chairman