

## ADVISORY OPINION NO. 2007-15

Issued on January 10, 2008 By the

### WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

A **County Solid Waste Authority** asks whether it may solicit donations for the purpose of making site improvements in preparation for the construction of a recycling facility.

#### FACTS RELIED UPON BY THE COMMISSION

County and Regional Solid Waste Authorities are responsible for implementing control plans for the collection, transportation, processing, recycling and disposal of solid waste in West Virginia. W.Va. Code § 22C-4-1 and § 22C-4-8. The Requester, a County Solid Waste Authority, wants to construct a recycling facility in its County. It has received a grant from a State Agency for this purpose. However, the grant monies may not be used for improving the site for the proposed facility. The Requester does not have an immediate source of funding which may be used for the site improvement. As such, it wants to solicit funds from citizens and businesses.

The Solid Waste Authority states that it wants a recycling facility as one means of trying to preserve the environmental health of its County by promoting recycling. The Legislature has found that improper disposal of garbage decreases property values and “[r]esults in the blight and deterioration of the natural beauty of the State.” W.Va. Code § 22C-4-1. The Legislature has directed Solid Waste Authorities to include in their comprehensive litter plans “A program to enlist the voluntary assistance of private industry and civic groups in volunteer cleanup efforts to the maximum extent practicable.” W.Va. Code § 22C-4-8(b)(9). There is no language in the enabling legislation for Solid Waste Authorities which specifically authorizes Solid Waste Authorities to solicit private businesses and citizens for funds to construct recycling plants or other solid waste disposal facilities.

#### CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(c)(1) reads:

A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family...

#### ADVISORY OPINION

The Ethics Act prohibits public servants from soliciting gifts unless the solicitation is for a charitable purpose. A gift is something given voluntarily and without something given

in return. Monetary contributions from local businesses, groups or individuals fall within the definition of gifts. The County Solid Waste Authority may only solicit monetary contributions for the construction of a recycling plant if the Ethics Commission finds that this activity constitutes a charitable purpose within the meaning of the Ethics Act.

Because the Ethics Act contains no definition of “charitable purpose”, the Commission must decide, on a case-by-case basis, which activities are charitable. In making this determination, the Commission first examines whether the Legislature has specifically authorized such a solicitation. If there is specific statutory authorization for a government agency to solicit for a stated purpose, then consistent with the rules governing statutory construction, the solicitation is permissible.<sup>1</sup> Still, the government agency must conduct the solicitation in a manner consistent with the rules established by the Ethics Commission. See A.O. 2005-02.

The plain language in the West Virginia Code authorizes Solid Waste Authorities to enlist private industry and citizens for volunteer clean-up activities. However, the enabling Legislation is silent as to whether Solid Waste Authorities may solicit monetary contributions from private industry and citizens for site preparation or the construction of a solid waste disposal facility. As the enabling legislation is silent as to whether a Solid Waste Authority may solicit for this purpose, the Ethics Commission must proceed to analyze whether the stated purpose is charitable under its existing precedent.

As a general guideline, the Commission recognizes two main categories of programs or activities which constitute a charitable purpose: (1) Those which benefit the poor or disadvantaged; and, (2) Those which serve a public purpose or provide a significant public benefit. In order for a public agency to solicit, the proposed solicitation must fall within one of the two stated categories. Even if a proposed solicitation falls within one of the stated categories, an equally important rule limiting solicitations by a government agency is that the government agency may not solicit funds to use for its internal operating expenses. A.O. 95-43 and A.O. 2005-02.

While the Commission understands the importance of recycling, it finds that the solicitation in question is not charitable for purposes of the Ethics Act. Historically, the Commission has taken the position that public agencies should only be allowed to solicit in limited circumstances. The Ethics Commission is reluctant to establish a precedent which suggests that solicitation from citizens and businesses by government agencies to construct public facilities is in the best interest of the public, particularly,

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<sup>1</sup> Pursuant to the common law in West Virginia, “When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference generally is accorded to the specific statute. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Newark Ins. Co. v. Brown, 624 S.E.2d 783, 788 (W.Va. 2005)

when the Commission has concerns that interested parties may feel compelled to donate. Normally, these traditional government functions have been funded through the use of taxpayer dollars. The Commission believes that whether a government agency should be permitted to solicit for this purpose involves consideration of public policy matters which are best decided by the Legislature. Hence, the Commission finds that the proposed solicitation is not charitable for purposes of the Ethics Act. The Solid Waste Authority may not solicit funds for the site preparation until and unless the Legislature statutorily authorizes Solid Waste Authorities to solicit funds for this purpose.

As expressly permitted by statute, Solid Waste Authorities may continue to solicit volunteer service for clean-up days. W.Va. Code § 22C-4-8(b)(9). Further, as previously authorized by the Ethics Commission in Advisory Opinion 90-201, Solid Waste Authorities may also solicit funds to support educational and media programs which promote recycling. Nothing in this opinion should be construed as prohibiting Solid Waste Authorities from accepting unsolicited donations of money and using the proceeds for capital improvements, including the construction of recycling facilities.

Whether an activity is charitable for purposes of the Ethics Act must be decided on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent.

  
R. Kemp Morton, Chairman