ADVISORY OPINION NO. 2016-03

Issued on February 4, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Municipal Board of Zoning Appeals asks whether one of its members may vote on whether to grant a variance to a real estate developer who may receive a letter of support or favorable public comment from a non-profit organization on whose Board the member also serves.

FACTS RELIED UPON BY THE COMMISSION

W.Va. Code § 8A-8-1 provides that if a governing body adopts a zoning ordinance, then it shall create a Board of Zoning Appeals ("BZA") to hear appeals on zoning issues. W.Va. Code § 8A-8-9 provides that, among other powers, a BZA may authorize variances to the zoning ordinance.

The BZA member is also a member of a non-profit organization whose purpose is to improve the downtown area of the city through revitalization, promotion of the business community and preservation of local architecture and design. In furtherance of these purposes, the non-profit's Board may issue letters of support or favorable public comment to the BZA for projects in the downtown area.

The Requester states that a real estate project developer has requested variance relief from the BZA that would allow the construction of a building that would include commercial spaces and apartments. In order for the building to be constructed in the proposed location, the builder must receive seven variances to the zoning ordinance. For example, the developer must receive variances to allow the building to be closer to the front and rear property lines than is permitted by the zoning ordinance. The non-profit organization may issue a letter of support or favorable comment to the BZA in support of the developer's request for the variances.

The BZA members and the non-profit organization's Board members are not compensated positions. The Requester states that the BZA member himself and his immediate family members do not have personal interests in the profits or benefits of the building project.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-1-3 reads, in relevant part:

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> (b) "Business" means an entity through which business for-profit is conducted . . . .

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

> (1) Public officials... may not vote on a matter:
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> > (A) In which they... or a business with which they... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... 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.

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The overriding purpose of the voting provision of the Ethics Act is to "ensure that a public official does not vote or take action on a matter in which he or she has a financial interest." Advisory Opinion 2011-12. The Requester states that the BZA member does not have a personal interest in the building project or the variance request. The question here is whether the BZA member **by virtue of his non-profit Board membership** has a financial interest in the variance that would prohibit him from voting on the variance.

The Ethics Act does not prohibit the BZA member from voting on issues concerning the variance or building project. The voting restrictions in W.Va. Code § 6B-2-5(j) prohibit public officials from voting on matters in which (1) they, (2) an immediate family member or (3) a "business" with which they are associated has a financial interest.

The BZA member himself and his immediate family members do not have a financial interest in the building project.

Further, although the BZA member is associated with the non-profit organization, it is not a "business" as defined by the Act to which the voting restrictions in W.Va. Code § 6B-2-5(j) apply. Non-profits are not included in the Ethics Act's definition of "business" in W.Va. Code § 6B-1-3(b). In Advisory Opinion 2011-12 the Commission held that, "public officials who are uncompensated board members of a non-profit organization are not required to recuse themselves on any matters related to any contract or other transaction between the governing

body and the non-profit organization."[1] *See also* Advisory Opinions 2014-02 and 2014-05.

In conclusion, the Ethics Commission holds that the BZA member may vote on whether to grant a variance to a real estate developer who may receive a letter of support or favorable public comment from a non-profit organization on whose board he also serves.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the 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 at 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 other public agencies unless and until it is amended or revoked or the law is changed.

Robert J. Wolfe, Chairperson
WV Ethics Commission

[1] For purposes of this Advisory Opinion, the Commission does not need to determine whether the non-profit organization has a financial interest in the variance.

ADVISORY OPINION 2016-04

Issued on February 4, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Council** asks whether its Mayor may continue to serve as City Administrator.

FACTS RELIED UPON BY THE COMMISSION

In 2006, the Requester voted to appoint its Mayor as City Administrator, a full-time position. The position of Mayor is part-time.

The Mayor recused himself from the vote and deliberations on the appointment. The Requester states that the Mayor has at all times since his appointment as City Administrator recused himself from matters affecting his compensation as City Administrator or Mayor.

The Requester is a Class III city. The City Council is the governing body and consists of five members. The Mayor votes only in the event of a tie.

The City has a charter, but it does not designate a form of government for the City. The Requester states because it is "a Class III [c]ity, the law assigns no presumptive or default form of government." The Requester further states the act of hiring its Mayor as City Administrator "may be considered a *de facto* change in the form of City government to a "Strong Mayor Plan," in which the Mayor is the administrative authority and Council the governing body."[1] According to the Requester, the Mayor "continues to serve the City as its administrative authority, responsible for the conduct and management of the affairs of the City in accordance with the ordinances, resolutions, and orders of the governing body."

The Requester asserts its City is well-run and is an "award-winning economic, cultural and tourism hub" of the county where it is situated. The Requester states its objective in having its Mayor continue to serve as the City Administrator is to allow it to amend or reenact its charter for purposes of legally codifying its form of government.

The Requester states that if the Ethics Commission allows its Mayor to continue to serve in this position, it will allow its citizens "to objectively determine the best form of government for the City while avoiding the cost and turbulence of a potentially unnecessary and certainly undesirable change in City administration during the process."

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[1] The Requester cites W.Va. Code § 8-3-2 in support of its conclusion.

The City will seek to amend its charter either by ordinance or through the election process wherein voters select seven members to serve on a charter board which proposes amendments to the charter in accordance with the process established by the West Virginia Code. *See* W.Va. Code §§ 8-4-7 and 8-4-8.

The Requester submits it only seeks authority for its Mayor to serve as City Administrator until the enactment of charter provisions designating the form of government of the City pursuant to W.Va. Code §§ 8-3-1 through 8-3-10. The Requester further represents it will adopt the following ordinances if the Ethics Commission authorizes the continued employment of its Mayor: (1) an ordinance authorizing and directing citizens to bring complaints or concerns about the City Administrator to City Council, and (2) an ordinance mandating the Mayor's recusal from the vote and deliberations on matters affecting the City Administrator's compensation and prohibiting any compensation to the City Administrator beyond the legislated annual salary.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) reads 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(d)(1) reads in relevant part:

> In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family ... may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body...

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Nothing in the Ethics Act expressly prohibits a public official from being employed by the governing body on which he or she serves. This conclusion is based upon the plain language in the Act, which reads: "nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body ..." *See* W.Va. Code § 6B-2-5(d)(1).

The Ethics Commission has examined the application of this Code provision in past Opinions. In Advisory Opinion 2012-01, the Commission considered whether a city may

employ a city council member as a building official.[2] The Commission, relying upon prior Advisory Opinions and the plain language in the Ethics Act, held "that nothing in the Ethics Act prohibits a City Council Member from also serving as the city building inspector." *Id.* at 2.

In contrast, the Commission ruled in Advisory Opinion 2006-05 that a mayor in a strong mayor form of government could not also be employed by the town. The Commission reasoned "that the spirit and intent of the prohibition" against use of office for private gain "would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees." *Id.* at 3. *See also* Advisory Opinion 2012-04. The Commission qualified its holding with the recognition "that there may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities." *Id.*

The Ethics Commission takes this opportunity to reconsider and overrule Advisory Opinions 2006-05 and 2012-04. While the Commission believes conflicts may arise if a city council hires its mayor, the Commission finds there is nothing in the Ethics Act which prohibits a city council from employing its mayor.

Further, as the Ethics Act authorizes the employment of a mayor by the city where he or she serves, it is not necessary for a city council to seek a contract exemption prior to employing its mayor.[3] The hiring decision must be based upon merit, not favoritism.[4]

The Commission holds the Requester may continue to employ its Mayor as City Administrator. The Requester may not show favoritism or give special treatment in making employment decisions concerning its Mayor. The Mayor may not vote on personnel matters affecting him or her directly as opposed to affecting five or more employees in the same or similar manner. W.Va. Code § 6B-2-5(j)(II)(A). *See* Advisory Opinion 2014-14.

County elected and appointed officials are cautioned that they are subject to the stricter limitations in W.Va. Code § 61-10-15, which in most instances prohibits the employment of elected county commissioners and their dependents in the counties whether they serve, and the employment of county officials and their dependents by the county agencies on which they serve as board members. Many state boards and commissions are also subject to W.Va. Code § 30-1-11(d), which expressly prohibits state board members from being employed by the board on which they serve.[5]

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[2] *See also* 2014-14 generally addressing this issue as it relates to a city council member being employed by the city in a municipality organized as a mayor-council plan of government.
[3] *See generally* Contract Exemptions 2008-08, 2009-01, 2011-04, 2012-06 and 2014-03.
[4] This ruling also applies to other governing bodies.
[5] This Code section reads "[n]o member of any board in this chapter may receive compensation as an employee of the board." *Id.*

In conclusion, the Ethics Commission holds that the Requester may continue to employ its Mayor as City Administrator. The Requester may not show favoritism or give special treatment in making employment or personnel decisions affecting the Mayor in his capacity as City Administrator. The Mayor must recuse himself from the vote and deliberation on personnel matters which directly affect him.[6]

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the 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 at 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 other public agencies unless and until it is amended or revoked or the law is changed.

Robert J. Wolfe, Chairperson
WV Ethics Commission

[6] The Commission supports the Requester's statement that it will seek to amend its charter either via ordinance or through the election process wherein voters select seven members to serve on a charter board which proposes amendments to the charter and suggests that it take this action as soon as possible.