

CONTRACT EXEMPTION NO. 2007-04

Issued On November 1, 2007 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Ripley City Council** asks for an exemption to permit it to purchase merchandise and services from Moore's Tractor Sales & Service (Moore's), a hardware store owned by a recently elected Council member, Edward Moore.

FACTS RELIED UPON BY THE COMMISSION

Edward Moore was recently elected to serve on Ripley's City Council. For the past twenty years, the City of Ripley purchased Stihl products from Moore's. As a result of those purchases, the City now owns Stihl concrete saws, chain saws, trimmers, and miscellaneous parts and accessories. Moore's is the only store in Jackson County that sells and services Stihl products. Replacement parts from other manufacturers are not interchangeable with Stihl products.

Due to the age of the City's infrastructure, water breaks are common, requiring frequent trips to the hardware store. Moore's is located across the street from the City Building. Mr. Moore lives next door to the store. He has always been available at any time the City needed access to parts and service for equipment and tools.

The next closest hardware store is on the other side of Spencer, approximately twenty five (25) miles from Ripley. The approximate round trip travel time is one hour, not including the time the equipment is out of service. The IRS allowable mileage expense reimbursement rate is 44.5 cents. Applying this rate, the expense of making each round trip to the next closest hardware store is \$22.25.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. This prohibition prevents a City from doing business with a business owned by one of its Council members. The Ethics Act also provides, however, that the Ethics Commission may grant a municipality an exemption from this prohibition, if the agency demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation.

The Commission first notes that the City would incur excessive cost if it had to replace every Stihl product it owns.

As the Commission stated in Advisory Opinion 2005-05, small towns have a limited number of employees and financial resources; there the Commission found that requiring the Town to make purchases from a hardware store located thirteen (13) miles away would result in excessive costs and would create an undue hardship. The Commission also observed that not only would such trips be burdensome, there were also associated vehicle and labor costs. The same is especially true here where such a trip is twice as far away and gasoline prices considerably higher than they were a mere two years ago.

Finally, if a part breaks on a concrete saw during a water leak repair, it is would substantially interfere with the City's ability to timely repair the leak if its employees were prohibited from going to Moore's for immediate service.

Based upon the foregoing, the Ethics Commission grants the City of Ripley an exemption for incidental purchases from the prohibition of W.Va. Code § 6B-2-5(d) to allow it to purchase parts and accessories, and to obtain services from Moore's that are otherwise not available in Jackson County. The exemption is granted with one limitation: should the City determine it needs to purchase a new tool or other piece of equipment (other than a Stihl part or accessory for an existing tool) that exceeds the cost of \$100.00 (one hundred dollars), it may not make any such purchase from Moore's.

Further, it would not violate W. Va. Code § 6B-2-5(d)(1) for Councilperson Moore to sell Stihl parts and services to the City, with the limitation set forth above, provided he fully discloses his involvement in any such sale or service and excuses himself from any evaluation, discussion or vote to approve the sale.

The Commission notes that exemptions must be granted 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 a precedent by other persons.

s/s _____
R. Kemp Morton, Chair