

CONTRACT EXEMPTION NO. 2007-05

Issued On December 6, 2007 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Rowlesburg Town Council** asks for an exemption to permit it to borrow \$2,000 from Mayor Barbara Banister, at no interest, to apply toward the cost of demolishing a Town-owned building that is both an eyesore and a health hazard.

FACTS RELIED UPON BY THE COMMISSION

Since 20022, the Town of Rowlesburg has owned a building that is in poor condition and presents a health hazard. It would cost \$300,000 to repair it, and the Town has been unable to find a buyer for the building. By contrast, it will cost \$20,000 to demolish the building.

The Town has made many pleas for and obtained some financial assistance. The Governor's Office has promised \$15,000 if the Town comes up with the remaining \$5,000. Despite its efforts, the Town finds itself \$2,000 short. Although the Preston County Commission appears willing to help, it is unable to do so at this time. Now several citizens are threatening to go to the Health Department to complain of the building's condition and the hazard it presents.

Due to the lack of success in raising additional monies, Mayor Banister and her husband have offered to loan the Town \$2,000 at no interest.

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 a public servant from being a party to or having a financial interest in a public contract which she has the power to award or control. This prohibition prevents a Town from accepting even an interest free loan from its Mayor. 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.

Our first inquiry is whether the proposed interest free loan is subject to the Ethics Act's prohibition. Notwithstanding the fact that the Mayor will not realize any profit from making an interest free loan to the Town, by loaning money to the Town, the Mayor becomes the Town's creditor. If the Town were ever in a situation where it lacked funds to cover all of its outstanding debts, the Town would be in a position of deciding among its creditors—including its Mayor—which to pay. Further, if in the unfortunate event the Town had to declare bankruptcy, the Mayor would be competing with other creditors for whatever money was available for disbursement. Her dual roles as Mayor and creditor would then create, at minimum, the appearance of impropriety.

Having determined that the loan, unlike a gift, is subject to the Ethics Act, the Commission will now consider the Town's request for a contract exemption.

The Town has demonstrated its attempts to obtain money from other sources. Although the Town does not appear to have approached any commercial lender, the Commission takes administrative notice that the Town would be unable to obtain an interest-free loan from a bank or other commercial lender. Indeed, the Mayor's offer to make an interest-free loan represents a financial sacrifice by the Mayor and her husband.

Based upon the foregoing, the Ethics Commission grants the Town of Rowlesburg an exemption from the prohibition of W.Va. Code § 6B-2-5(d) permitting it to borrow \$2,000 from Mayor Barbara Banister and her husband at no interest under the condition that the loan is **unsecured**. Further, when the matter arises at any public meeting, Mayor Banister should fully disclose her involvement in the proposed loan and excuse herself from any evaluation, discussion or vote to approve the loan. This recusal requirement also applies to any subsequent issues that may arise before Council regarding repayment of the loan.

Council should take further measures to minimize the occasions that would require it to take official action related to the loan. The Commission recommends that Council establish a payment schedule for the repayment of the loan and that Mayor Banister and her husband are deemed primary creditors requiring payments to be made on a priority basis.

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