

**CONTRACT EXEMPTION NO. 2010-07**

**Issued On January 13, 2011 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

The **Hancock County Board of Education** asks for a contract exemption to allow it to purchase property from Assistant Prosecuting Attorney William Fahey.

**FACTS RELIED UPON BY THE COMMISSION**

The Hancock County Board of Education (BOE) seeks to construct a new elementary school on property owned, in part, by an Assistant Prosecuting Attorney. According to the BOE, its request for an exemption is based upon the following.

The BOE directed its Superintendent to search for a new site. The Superintendent personally visited all suitable sites which were on the market. The Requester states that these sites were unacceptable as there was limited access due to narrow streets at or near these sites. Further, the other sites considered were not centrally located in relation to the location of the existing three elementary schools which will be replaced by the new facility.

The Superintendent states that she was aware of a forty-two (42) acre tract which was centrally located between the three existing elementary schools. When the Superintendent first considered this site, it was not actively being marketed for sale.

One of the owners of this property is William Fahey, Assistant Prosecuting Attorney for Hancock County. He, at times, provides legal representation to the BOE.

According to the Requester, Mr. Fahey stated that he would engage in discussions with the BOE relating to the property, but would remove himself from rendering any legal advice to the BOE regarding the purchase of the property. Moreover, in his capacity as an Assistant Prosecutor, he removed himself from any negotiations between the BOE and architects, engineers or construction companies. The Prosecutor became the point of contact for the BOE on these matters.

The Requester states that the Superintendent and BOE jointly determined that this site was the most suitable for the construction of the new school. In making this determination, it considered that there is direct access to this site from Pennsylvania Avenue which is a main thoroughfare in the Weirton Heights area of the county. The Requester also states that the site consists of flat and rolling land which, in the opinion of the BOE, will fully accommodate all proposed uses for the site.

The parcel was appraised for 1.35 million dollars. The appraisal was conducted by two appraisers. The agreed-to purchase price is 1.2 million dollars.

The BOE states that no other location within City limits is economically feasible or desirable. The subject property was listed as the proposed site for the construction of a new school on a bond levy approved by the voters, by a slim margin, in November of 2010.

The BOE asserts that, in its opinion, the site of the proposed school strongly influenced the decision of citizens who voted in favor of the passage of the levy. Additionally, the BOE states that, if it is unable to purchase the site, then there may be Court challenges to the bond levy which could adversely affect the implementation of other improvements and renovations authorized and funded thereby.

### **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code § 6B-2-5(b) reads:

*Use of public office for private gain.* -- (1) 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body....

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 ...county school board... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code § 61-10-15(a) states in part that ... It is unlawful for any ...county or district officer ...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: *Provided*, That nothing in this section prevents or makes unlawful the employment of

the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

Finally, W. Va. Code § 61-10-15(h) provides:

Where the provisions of subsection (a) of this section would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

### **ADVISORY OPINION**

The Ethics Act, W. Va. Code § 6B-2-5(d)(1) and W.Va. Code § 61-10-15, prohibit public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Here, the Ethics Act does not prohibit the subject transaction as the Prosecutor is a part-time appointed official. W.Va. Code § 6B-2-5(d). See A.O. 2010-24 which addresses the part-time appointed official exception and its application to part-time appointed prosecutors. However, as W.Va. Code § 61-10-15 does not contain this same exception, to comply with the limitations in that code section, the BOE is required to seek and receive a contract exemption before purchasing the subject property. Hence, this request is properly before the Commission.

The BOE maintains that the 42 acre site is the most suitable location for the new elementary school. While it considered other sites, the BOE states that this site is centrally located, accessible, and that the flat and rolling layout of the land makes the acreage most useful for its proposed use and any future expansion. By contrast, no other property considered has the subject property's many attributes.

Based upon the information provided, it appears that the BOE evaluated potential sites in the county and selected this site based upon its independent determination that it best meets the needs of the school system. Moreover, it was this property which was presented as the proposed site of the new school when the public was asked to cast its vote at the November election. The Requester asserts that the site of the new school attributed to the passage of the levy. There may be no scientific means of proving that assertion; however, the Commission finds that, by voting to pass the levy, the electorate affirmed the choice of the BOE in regard to the proposed site.

The Ethics Commission finds that if the BOE is unable to purchase the subject property, then it will result in undue hardship or other substantial interference with the operation of the BOE. Accordingly, the Ethics Commission hereby grants the BOE an exemption to purchase the subject property. The Assistant Prosecutor should continue to recuse himself from all matters relating to the subject transaction.

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R. Kemp Morton, III Chairperson