State of West Virginia
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The Honorable Michael A. Hicks
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Dear Prosecutor Hicks:

You have asked for an Opinion of the Attorney General concerning whether a sitting county commissioner may serve on the West Virginia Infrastructure and Jobs Development Council ("IJDC").

This Opinion is issued under West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence and discussions with the Office of the Attorney General.

In answering your question, we note how the IJDC functions. First, project sponsors such as municipalities or county commissions develop project proposals, complete IJDC-issued applications, and apply for state funding. *See, e.g.*, W. VA. CODE §§ 31-15A-2(p), -4(b). The IJDC then conducts an initial review and determines the project's suitability based upon several factors. *See id.; see also* W. VA. CODE R. § 167-1-4.1. After writing a recommendation on the application (identifying the funding source, the amount of funding, and which agency or agencies should consider the project), *see* W. VA. CODE R. § 167-1-3.5, the IJDC routes it to the most appropriate state infrastructure agency for the project, *see* W. VA. CODE §§ 31-15A-2(u), -5(b). If the IJDC recommends denial and the agency agrees, the project receives no funding. If the IJDC recommends approval and the agency concurs, then the agency signs a written agreement with the project sponsor and handles any compliance issues that may arise. *See, e.g.*, W. VA. CODE § 31-15A-9(d); § 31-15-23a(e); § 22-28-3. The governing body of the agency or agency head can also reject a recommended project in certain circumstances. *See* W. VA. CODE § 31-15A-5(c). Once the agency has rejected the recommendation, the process ends.

Your letter raises one legal question:

Does any constitutional provision, statute, or other common-law doctrine prevent a sitting county commissioner from serving on the IJDC?

We conclude that no West Virginia constitutional provision or statute categorically prohibits a sitting county commissioner from serving on the IJDC. The two offices are not incompatible under the common law, but it would nevertheless be advisable for the commissioner to recuse when the IJDC considers an application from his or her own county.

DISCUSSION

I. Dual service does not violate the separation of powers.

Article V, § 1 of the West Virginia Constitution provides that no "person [may] exercise the powers of more than one" of the legislative, executive, and judicial departments "at the same time." The Supreme Court of Appeals strictly enforces this provision. *See O'Connor v. Margolin*, 170 W. Va. 762, 296 S.E.2d 892 (1982). But it is not implicated here. A county commission is a political subdivision, not a department of state government, so a commissioner exercises no legislative or judicial power of the State that could collide with the IJDC's executive functions. *See Amoroso v. Marion Cnty. Comm'n*, 172 W. Va. 342, 346 n.7, 305 S.E.2d 299, 303 n.7 (1983) ("[C]ounty commissions … are not instrumentalities of the state.").

No other constitutional provision appears even distantly relevant. The Supreme Court of Appeals has recognized that the common-law doctrine of incompatibility (discussed further below) is "supplemented but not displaced" by constitutional provisions "inhibiting one person from holding more than one office at the same time." *State ex rel. Thomas v. Wysong*, 125 W. Va. 369, 374, 24 S.E.2d 463, 466 (1943). But where the Framers intended to bar dual office-holding, they said so expressly. *See, e.g.*, W. VA. CONST. art. VIII, § 7 (judicial officers may not "hold any other office, or accept any appointment or public trust"). No comparable provision applies to county commissioners. While the Constitution prescribes duties and eligibility requirements for commissioners, those provisions do not place limits on commissioners' ability to hold other offices. *See* W. VA. CONST. art. IX, §§ 9-10.

II. No statute prohibits a county commissioner from serving on the IJDC.

We look next to whether any statutes might be implicated by concurrent service on a county commission and the IJDC. As always, we begin with the text and "apply the statutory language as written without further interpretation." *Trulargo, LLC v. Pub. Serv. Comm'n*, 242 W. Va. 482, 486, 836 S.E.2d 449, 453 (2019).

A. West Virginia Code § 31-15A.

The IJDC's enabling statute places no limits on board members' ability to hold other positions. *See* W. VA. CODE § 31-15A-3. Elsewhere, the Legislature has expressly limited dual roles. *See id.* § 31-15-27 (voiding contracts and agreements made by the Economic Development Authority when a "member, officer or employee" of the authority is an "interested" party). The absence of a similar limit here suggests that the statute permits dual service.

B. West Virginia Code § 61-10-15.

West Virginia Code § 61-10-15 makes it "unlawful for any member of a county commission … 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 … he or she may have any voice, influence or control." W. VA. CODE § 61-10-15(a).

This provision does not reach a county commissioner's service on the IJDC for two reasons. First, the provision requires a contract or service that generates "proceeds." The IJDC makes funding recommendations, the State agency involved makes a final determination, and counties may then contract with individuals or businesses to carry out the projects. *See* W. VA. CODE § 31-15A-9(d). But the funding recommendation itself involves no contract or service that generates proceeds. *See, e.g.*, *id.* §§ 31-15A-5(c), -9.

Second, a county commissioner ordinarily has no pecuniary interest in the funding of a county infrastructure or jobs project, as any resulting contract runs to the county, not the commissioner. To define the term's provisions, the West Virginia Supreme Court of Appeals has looked to the definition section of the Bribery and Corrupt Practices Act. *See State v. Neary*, 179 W. Va. 115, 123-24, 365 S.E.2d 395, 403-04 (1987). It defines "benefit" as "gain or advantage" and "pecuniary benefit" as "a benefit in the form of money, tangible or intangible property, commercial interests or anything else the primary significance of which is economic gain." W. VA. CODE § 61-5A-2(8). The definition also reaches gains to "any other person," and one might question whether a county's funding is such a gain. But Section 61-10-15 asks whether the commissioner is pecuniarily interested in the proceeds of a contract, and *Neary* applied that phrase to officials' personal economic stakes. A county's receipt of public infrastructure funding is not the commissioner's economic gain. And the state infrastructure agency, not the IJDC, is the contracting party. So, on neither side of the transaction does dual service create pecuniary interest.

Nor does a commissioner benefit because his or her county might improve from a funding recommendation. The Code excludes from "benefit" any "concurrence in official action in the course of legitimate compromise among public servants." W. VA. CODE § 61-5A-2(8). An IJDC funding recommendation is that kind of official action. It requires the support of other IJDC members and the agreement of the state infrastructure agency that enters the contract. So, any resulting benefit cannot be attributed to an individual county commissioner.

The Supreme Court of Appeals has also explained that the provision aims to "protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself." *Neary*, 179 W. Va. at 118, 365 S.E.2d at 398 (cleaned up). For that reason, the Court applies an "absolute standard of conduct" when public officials have a "relationship with a private entity." *Summers Cnty. Citizens League, Inc. v. Tassos*, 179 W. Va. 261, 268, 367 S.E.2d 209, 216 (1988). But here, both positions are public, and IJDC funding recommendations create no financial interest. Thus, the statute does not bar dual service.

C. The Governmental Ethics Act.

Like Section 61-10-15, the Governmental Ethics Act focuses on financial interests that arise from public office. The Act restricts a public official from voting on a matter in which the

official, "an immediate family member, or a business with which they or an immediate family member is associated have a financial interest." W. VA. CODE § 6B-2-5(j)(1)(A). Again, holding these two roles creates no financial interest, thus the Act does not bar dual service. And even if dual service did create a financial interest, the Act would require only recusal, not resignation. *See id.* § 6B-2-5(d)(1).

Our conclusions align with the Ethics Commission, which has already concluded that no provision of the Governmental Ethics Act prevents a county commissioner from serving on the IJDC. If a commissioner has a generalized interest in seeing a project in his or her county funded, the Ethics Commission has concluded that this interest "would not differ from that of any other citizen of the county." W. Va. Ethics Comm'n, Advisory Opinion No. 2026-07, at 4 n.1 (Sept. 3, 2026). And in response to a specific inquiry addressing these facts, the Commission found that the Act only reaches financial interests, not situations in which officials "wear two hats." Because of that financial focus, and because the commissioner receives no compensation from the IJDC, the Commission determined that dual service does not violate the Act.

III. Holding both offices does not violate the doctrine of incompatibility.

Apart from statutory prohibitions, a person may not hold two offices whose "inconsistent nature" and "relation to each other" make it "improper, from considerations of public policy, for one person to perform the duties of both." Syl. pt. 6, *Wysong*, 125 W. Va. 369, 24 S.E.2d 463. The doctrine "rests not upon physical inability to perform the duties of two offices but upon the inconsistent nature of the offices and their relation to each other." *Id.*

The doctrine applies only to public offices, so we first ask whether both positions qualify. The Supreme Court of Appeals considers several factors in deciding whether a role is a "public office," including whether the position was "created by the legislature," "whether the legislature in creating the position designated it an office, whether the qualifications for the appointee are prescribed, and whether the duties, tenure, salary, bond, and oath are prescribed or required, and whether the act constitutes the one occupying the position a representative of the sovereign." *State ex rel. Carson v. Wood,* 154 W. Va. 397, 411, 175 S.E.2d 482, 491 (1970).

Under these factors, both county commissioners and IJDC members are public officers. First, the Supreme Court of Appeals has long held that county commissioners are public officers. *See, e.g.*, *State ex rel. Damron v. Ferrell*, 149 W. Va. 773, 143 S.E.2d 469 (1965); Off. of the W. Va. Att'y Gen., Opinion Letter to the Honorable Ken Hechler (Jan. 9, 1991), 1991 WL 628001. Article IX of West Virginia's Constitution establishes county commissions, making commissioners constitutional officers. *See* W. VA. CONST. art. IX, § 9. Second, IJDC members meet several key indicia of public office. The Legislature created the IJDC, the statute describes membership as an "office," it prescribes qualifications, including limits on the number of members from the same political party or the same county, and it defines the IJDC as a "governmental instrumentality of the state." W. VA. CODE § 31-15A-3(a)-(g).

Because both positions are public offices, the doctrine of incompatibility applies.

Incompatibility typically arises in two situations: when an officer becomes financially interested in an outcome he or she controls, or when one office directs and supervises another office held by the same person. *See, e.g.*, Hechler Opinion Letter, 1991 WL 628001 (finding the

offices of county commissioner and state legislator incompatible because the Legislature sets county commissioners' compensation); Off. of the W. Va. Att'y Gen., Opinion Letter to Eugene Simmons (Dec. 14, 2016), 2016 WL 7428074, at *2-3 (concluding that an attorney for a county commission could not also serve as a fiduciary commissioner because the county commission "maintains supervisory authority over the fiduciary commissioner" through its removal power, and that "no matter the nature of the legal services the person would render," there was a "lack of disinterestedness in the performance of each office").

Neither situation exists here. The IJDC holds no supervisory control over counties, and counties hold none over the IJDC. Once the IJDC makes its recommendation, its role ends. State infrastructure agencies make the final funding decision and resolve any subsequent compliance issues under the agreement with project sponsors. *See* W. VA. CODE § 31-15A-9(d). A recommendation may impact a project sponsor's chances of receiving funding, but that influence falls far short of the county commission's power to remove a fiduciary commissioner. *See* Simmons Opinion Letter, 2016 WL 7428074, at *2.

IV. The commissioner should consider recusing when his or her county applies to the IJDC for funding.

That leaves the narrow case in which the commissioner's county is a project sponsor—meaning it "intends to plan, acquire, construct, improve or otherwise develop a project"—while the commissioner sits on the IJDC. W. VA. CODE § 31-15A-2(p). This Office addressed a similar situation when a city council member sought to work as a deputy county assessor. *See* Off. of the W. Va. Att'y Gen., Opinion Letter to the Honorable John C. Skinner (Aug. 24, 1962), 1962 WL 75144. There, we recognized that most of a deputy assessor's work—such as assessing land outside the officer's city—was disinterested. *Id.* at *2. But assessing land within the city could create conflicts, because the assessor might be tempted to inflate city land values. *Id.* We did not conclude that one person could not hold both offices. Instead, we counseled that the "safest course is to refrain" from such conduct. *Id* at *3. The same is true here.

The duties of the two offices rarely intersect, except when the IJDC evaluates a proposal from the commissioner's county. Like the assessor, a commissioner on the IJDC might be tempted to vote to approve the county's application or to fund it more generously than necessary. An IJDC member has less control over the final outcome than a lone assessor does. But the ability to vote and to sway fellow members still creates a risk of impropriety. The same risk arises if the commissioner signs the application or advocates for the project before fellow IJDC members. On either side, the commissioner should not use his or her authority and relationships to influence the outcome. The same concern may extend to entities under a county commission that seek funding. So, the most prudent course is for the commissioner to recuse from the IJDC's consideration and to stay out of preparing or presenting the proposal as a county commissioner.

The Governmental Ethics Act provides a recusal mechanism. The official may leave the room, take no part in the discussion, decision-making, or vote, and have the recusal reflected in the meeting minutes. *See* W. VA. CODE § 6B-2-5(j)(3). Recusing this way protects the integrity of the IJDC's recommendation, though it creates no legal presumption against impropriety.

Recusal is not what makes the offices compatible. The doctrine looks to the offices' "inconsistent nature." These offices are not inconsistent, as their duties meet only at an occasional, identifiable point that recusal addresses.

* * *

No constitutional provision, statute or recognized application of the common law forbids dual service. But a commissioner should not vote on applications from his or her own county or help present such proposals before the IJDC. If that circumstance arises, it may be wise for the commissioner to recuse (although no law strictly requires it).

Sincerely,



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