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The Honorable E. Ann Shabb
Executive Director
West Virginia Economic Development
Authority
Building 6, Room 525
Charleston, West Virginia 25305

Dear Ms. Shabb:

You have requested the opinion of the Attorney General with respect to a potential conflict of interest for four members of the Board of the West Virginia Economic Development Authority (WVEDA). In this regard, you have asked that we specifically address the following three questions:

1. Do the positions of these various Board members with respect to their associated capital companies constitute a direct or indirect financial interest under Section 5E-1-14 [of the West Virginia Capital Company Act]?
2. Would any potential conflict of a Board member under Section 5E-1-14 be cured by that member's abstention on any vote of the WVEDA Board involving the specific capital company with which that Board member had a direct or indirect financial interest?
3. Would abstention also serve to resolve the conflicts of Board members when the WVEDA Board is exercising its power to issue and amend regulations governing West Virginia capital companies?

All of the questions posed to this office may be condensed into the following general issue: In light of the fact that the West Virginia Industry and Jobs and Development Corporation has been abolished and its interests vested in the Economic

Development Authority, how is the conflict of interest provision of Chapter 5E, Article 1, Section 14, of the West Virginia Code of 1931, as amended, (hereinafter "Code") to be interpreted?

It is important to review the history of the West Virginia Capital Company Act. The Capital Company Act was enacted in 1986 to stimulate private investment of venture and equity capital in the West Virginia economy by making tax credits available to taxpayers investing in certified West Virginia capital companies. Code 5E-1-2 (1987).

The power to promulgate rules and regulations to carry out the proposals and determine eligibility for assistance was vested in the West Virginia Industrial and Trade Jobs Development Corporation. Code 5E-1-4, Code 5E-1-5, and 5C-2-1 et seq. (1987). See Title 117 Code of State Rules, Series 1, effective June 12, 1987.

The West Virginia Industrial and Trade Jobs Development Corporation was governed by a three-member board appointed by the governor with the advice and consent of the West Virginia Senate. The members of the board were prohibited from engaging in any other business. Code 5C-2-3(f) (1987). The West Virginia Industrial and Trade Jobs Development Act also provided:

No officer, member or employee of the corporation shall be financially interested, directly or indirectly, in any contract of any person with the corporation, or in the sale of any property, real or personal, to or from the corporation. This section does not apply to contracts or purchases of property, real or personal, between the corporation and any governmental agency. Any officer, member or employee of the corporation who has such financial interest in a contract or sale of property prohibited hereby, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned. Code 5C-2-3(g) (1987).

In addition to the misdemeanor penalties of Chapter 5C, the Capital Company Act contained, and still contains, a broader prohibition in Chapter 5E: "No officer, member or employee of the board shall be financially interested, directly or indirectly, in any capital company." Code 5E-1-14 (1987).

As used in Article 1, Chapter 5E, "[b]oard" means the board of directors of the West Virginia industrial and trade jobs

development corporation, provided for in article two, [Section 5C-2-1 et seq.], chapter five-c of this code." Code 5E-1-4(a) (Supp. 1989); See also 117 CSR 1, Section 1.5.1.4.

In 1988, the Legislature repealed Article 2, Chapter 5C, of the West Virginia Code, and in so doing abolished the West Virginia industrial and trade jobs development corporation. Article 1, Chapter 5C was amended and reenacted to vest all authority previously held by that corporation in the newly-created West Virginia industry and jobs development corporation. Code 5C-1-3(c) (Supp. 1988); 1988 W. Va. Acts 320, 324. The three-member board of the West Virginia Industry and Jobs Development Corporation was governed by a conflict of interest provision identical to that of former Code 5C-2-3(g) (1987), quoted infra. See 5C-1-5(g) (Supp. 1988); 1988 W. Va. Acts 324, 325-326.

On April 8, 1989, the Legislature passed Enrolled Committee Substitute for Senate Bill No. 575, (hereinafter S.B. 575) in effect from passage. This act repealed Article 1, Chapter 5C of the Code, thereby abolishing the West Virginia Industry and Jobs Development Corporation. Article 15, Chapter 31 was amended and reenacted to designate the West Virginia Economic Development Authority as corporate successor, vested with "all rights and interests heretofore vested" in the West Virginia Industry and Jobs Development Corporation. Code 31-15-3a (Supp. 1989); 1989 W. Va. Acts 314, 321. However, Code 5E-1-4(a) (Supp. 1989) of the Capital Company Act was not amended to reflect these changes in administration of the Act.

The previous board was abolished. A new board was created, effective April 8, 1989. Code 31-15-5 (Supp. 1989). This board is also the governing body of the Economic Development Authority. Code 31-15-4(b) (Supp. 1989). By virtue of S.B. 575, all duties imposed by the Capital Company Act are carried forward under a nine-member Economic Development Authority board.

The conflict of interest provision of Chapter 31 pertaining to the Economic Development Authority is as follows:

No member, officer or employee of the authority shall either directly or indirectly be a party to or interested in any manner in any contract or agreement with the authority whereby liability or indebtedness against or to the authority is in any manner created. Any contract or agreement made in violation of the provisions of this section shall be void and no action thereon shall be maintained against the authority. Code 31-15-27 (Supp. 1989).

The current Code 31-15-27 is very similar to an original provision passed by the Legislature in 1961 as Code 31-15-12 (1961, Vol. 2) and applicable to the WVEDA's predecessor, the West Virginia Industrial Development Authority. 1961 W. Va. Acts 717, 731. Under the 1961 statute, the Attorney General has ruled that no conflict of interest exists when an individual is both a Board member and an official of a banking institution participating in developing loans. 50 Op. Att'y Gen. 407 (August 3, 1963).

At that time, however, the Industrial Development Authority was not subject to the provisions of the Capital Company Act. When its duties were assumed by the Economic Development Authority in 1977, Code 31-15-12 (Supp. 1977) was amended and reenacted as the WVEDA's conflict of interest statute. 1977 W. Va. Acts 481, 500. This provision was amended slightly and reenacted in 1981 as Code 31-15-25 (Supp. 1981). 1981 W. Va. Acts 299, 327. It was reenacted, with its text unchanged, as current Code 31-15-27 (Supp. 1989) by S.B. 575 on April 8, 1989.

Where a later law is merely a reenactment of the former, it will not be regarded as repealing an intermediate act, which qualified and limited it, but the intermediate act will be deemed to remain in force qualifying or modifying the new act as it did the first. 17 M.J. Statutes Section 91. An exception exists when the two statutes are in irreconcilable conflict. When an irreconcilable conflict occurs, the later act will prevail over the intermediate act as being the last expression of the legislative intent. State v. Varney, 142 W. Va. 105, 109, 96 S.E.2d 72, 74 (1956). This is not the instant case. There is no irreconcilable inconsistency between the conflict of interest provision of the Capital Company Act and that of the Economic Development Authority. The Capital Company Act requires that "[n]o officer, member or employee of the board shall be financially interested, directly or indirectly, in any capital company." Code 5E-1-14 (1987). Senate Bill 575 recites that "[n]o member, officer or employee of the authority shall either directly or indirectly be party to or interested in any manner in any contract or agreement with the authority whereby liability or indebtedness against or to the authority is in any manner created." Code 31-15-27 (Supp. 1989).

Inconsistency does not lie where one provision of the Code is more stringent than another, unless the subsequent statute is plainly intended as a substitute for all previous law pertaining to its subject matter. An unexpressed intention to repeal or modify does not suffice. State ex rel. Marcum et al. v. Wayne County Court, 90 W. Va. 105, 110, 110 S.E. 482, 484 (1922). Accordingly, we are of the opinion that the conflict of interest provision of Chapter 31, reenacted by Senate Bill No. 575, is not

repugnant to the conflict of interest provision of the Capital Company Act, nor does it repeal it by implication.

You have asked how these conflict of interest provisions affect the eligibility of four individuals to sit as members of the Economic Development Authority. In your letter, you describe them as follows:

1. A Board member who has invested in a capital company;
2. A Board member who is an employee of an industrial development corporation that manages a capital company of which the individual development corporation is the largest investor in the capital company.
3. A Board member who is an executive officer of a bank which is wholly owned by a bank holding company that is an investor in a capital company; and
4. A Board member who is a member of the Board of a capital company and also is an executive officer of a bank which is wholly owned by a bank holding company that is the largest investor in a capital company, and this bank officer actively manages the capital company.

You have advised us that, subsequent to your letter, the first-named individual, who is a direct investor in a capital company, has resigned. Accordingly, we shall only examine the relationships of the remaining board members, based upon the facts as presented in your letter. The second-named member, who is an employee of an industrial development corporation that manages a capital company of which the individual development corporation is the largest investor in the capital company, has an indirect financial interest in a capital company. He could benefit indirectly if his company profited from its investment in and management of the capital company. The last-named individual, a member of the Board and manager of a capital company, and also an executive officer of a bank wholly owned by a holding company that is the largest investor in the capital company, also has a financial interest in a capital company. He could not only benefit indirectly as an employee of the bank, but also directly due to his active role in the management of the capital company. Compared to the others, the interest of the third-named member in a capital company seems less certain, based on the facts recited in your letter.

The third board member in question is an executive officer of a bank which is wholly owned by a bank holding company that is an investor in a capital company. The standard implied by the prohibition in Code 5E-1-14 against having an interest in a capital company is whether the individual or his employer, the bank, could profit directly or indirectly from the activities of the capital company in which the bank holding company has invested. If the individual or his bank could profit from the holding company's investment in the capital company, there is a conflict of interest, pursuant to Code 5E-1-14. If not, there is no conflict for this board member.

In applying the provisions of the Capital Company Act to determine the eligibility of these persons to serve on the WVEDA Board, we have looked to public policy of the State as expressed in its common law. In this area, the law is harsh, but clear. As the fiduciary of the people of the State, a public officer or public employee owes an undivided duty of loyalty to the citizens who are served. The public officer is not permitted to occupy an office that would expose him to conflicting duties or subject him to temptation to act in any manner other than in the best interest of the public. This policy is not limited to a single category of public officer but applies to all public officials. Graf v. Frame, ___ W. Va. ___, 352 S.E.2d 31 (1986). Accord, Summers County Citizens League v. Tassos, ___ W. Va. ___, 367 S.E.2d 209 (1988).

In Tassos, Code 61-10-15 (1984) was interpreted. It made unlawful any pecuniary interest of any county commissioner or school board member in the proceeds of any contract or service. The court endorsed the removal of three school board members who approved otherwise legitimate contracts in which they were indirectly interested. Also removed was a board member who voted to approve legitimate payments to companies which he knew were employers of other school board members. The removal provisions of Code 61-10-15, as amended, were deemed appropriate for a salutary public purpose, and rigid enforcement of the statute was endorsed. Tassos at 215.

We are of the opinion that, in light of (1) the expression of legislative intent in Code 5E-1-14, and (2) the strong statement of public policy in Frame and in the recent Tassos decision, the actions of the Economic Development Authority Board would be open to successful challenge if the candidates listed above had direct or indirect interests in capital companies and continued to serve as members of the Board, even if they abstained from voting on matters relating to capital companies.

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Code 5E-1-14 requires that individuals with even an indirect financial interest in a capital company cannot be members of the Economic Development Authority Board.

Very truly yours,

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