State of West Virginia
Office of the Attorney General

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August 14, 2013

Mr. Richard E. Hitt
General Counsel
Public Service Commission
201 Brooks Street, P.O. Box 812
Charleston, WV 25323

Dear Mr. Hitt:

You have asked for an opinion of the Attorney General pertaining to a potential negligence claim regarding the 1982 construction of the Public Service Commission ("PSC" or "Commission") Headquarters at Brooks Street. This opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law … whenever required to do so, in writing, by … the public service commission." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your letter to the Attorney General's Office.

You state that there are significant concerns regarding the condition of a freestanding arch at the PSC headquarters, which was constructed in 1982. According to your letter, concerns about the arch's condition led the Commission to obtain a preliminary inspection. That inspection resulted in a report in the fall of 2012, recommending immediate disassembly of the brick from the upper portion of the arch and further inspection of the PSC headquarters. You state that, upon further inspection, it was discovered that "the masonry work, installation of flashing and other aspects of construction were substandard." The inspectors determined that there must have been "little or no construction supervision" and urged "extensive remedial action" in light of the "potential public safety threat."

Your letter raises the following legal question:

Does West Virginia Code § 55-2-6a bar the PSC from recovering damages as a result of negligence on the part of the contractor and other entities involved in the construction of the building, due simply to the passage of time?

West Virginia Code § 55-2-6a is an express ten-year statute of repose on actions in tort to recover damages for deficiencies in construction. In pertinent part, the statute provides:

> No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property … may be brought more than ten years after the performance or furnishing of such services or construction.

W. Va. Code § 55-2-6a. The ten-year period begins when "the improvement to the real property in question has been occupied or accepted by the owner of the real property, whichever occurs first." *Id.*; *see also Neal v. Marion*, 222 W. Va. 380, 387, 664 S.E.2d 721, 728 (2008) (noting that period begins "when the builder or architect relinquishes access and control over the construction or improvement *and* the construction or improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first"). If a civil action commences, the statute tolls the ten-year period in certain circumstances. *See* W. Va. Code § 55-2-6a (providing that period shall be tolled "according to the provisions of section twenty-one of this article"); *see also id.* § 55-2-21 (tolling for certain claims "[a]fter a civil action is commenced").

Importantly, West Virginia Code § 55-2-6a is a statute of repose, not a statute of limitations. *See Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 217, 406 S.E.2d 440, 443 (1991). A statute of limitations "ordinarily begins to run on the date of the injury." *Id.* In contrast, under a statute of repose, "a cause of action is foreclosed after a stated time period regardless of when the cause of action occurred." *Id.* The "discovery rule"—which delays the running of a statute of limitations until such time as a plaintiff knows, or reasonably should have known, of any injury—does not apply. *See Shirkey v. Mackey*, 184 W. Va. 157, 159, 399 S.E.2d 868, 870 (1990).

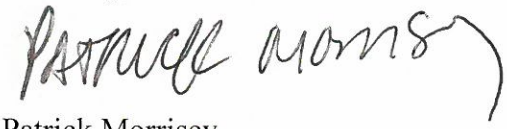
Our Supreme Court of Appeals has explained that "[t]he purpose of this type of statute of repose is to protect architects and builders from the increased exposure to liability as a result of the demise of the privity of contract defense." *Gibson*, 185 W. Va. at 220, 406 S.E.2d at 446 (rejecting constitutional challenge to statute). Put simply, "a party injured because of a latent design or defect could sue an architect or builder many years after a construction project was completed." *Id.* The statute prevents "stale claims with a distinct possibility of loss of relevant evidence and witnesses." *Id.* Accordingly, the expiration of a statute of repose "extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *Id.* (internal quotations omitted).

We conclude under the facts presented that a negligence suit against the builders of the Commission's headquarters for deficiencies in construction is no longer permissible due to West Virginia Code § 55-2-6a. Negligence is an action "in tort," and the statute expressly contemplates such suits to "recover damages for any deficiency in the planning, design,

surveying, observation or supervision of any construction or the actual construction of any improvement to real property." W. Va. Code § 55-2-6a. Based on your letter, the ten-year period under the statute should have begun to run in the early 1980s, and nothing suggests that the statutory requirement to toll the period was ever triggered. The time for filing the contemplated negligence suit has thus long expired.

While a negligence action is time barred, we note that the Supreme Court of Appeals has held that there are important limits to West Virginia Code § 55-2-6a. In *Neal v. Marion*, the Court ruled that the statute does not apply to situations involving affirmative misrepresentations regarding the condition of a property. 222 W. Va. at 388, 664 S.E.2d at 729. In other words, the statute of repose applies only to the "alleged defects themselves," and not any claims based on an alleged misrepresentation or the intentional concealment of the defects. *Id.* at 388, 664 S.E.2d at 729. If there were facts suggesting misrepresentation or knowing concealment, the analysis could be different.

Sincerely,



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