State of West Virginia
Office of the Attorney General

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May 30, 2014

The Honorable Lucas J. See
Prosecuting Attorney
Hardy County Prosecuting Attorney's Office
204 Washington St., Room 104
Moorefield, WV 26836

Dear Prosecutor See:

You have asked for an Opinion of the Attorney General pertaining to a conservation easement created under West Virginia Code § 20-12-1 *et seq.* and § 8A-12-1 *et seq.* This Opinion is being issued pursuant to 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." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your May 8, 2014, correspondence with the Office of the Attorney General.

In your correspondence, you state that there are concerns in Hardy County regarding a proposed new fiber optic line for high-speed internet service funded by the United States Department of Agriculture ("USDA"). The planned route of the fiber optic line, which is intended to serve more than thirty residents as well as the West Virginia University farm located in the Wardensville area, is through the property of Mr. Joshua Frye. Efforts to secure an alternative route of construction for the fiber optic line appear to have been exhausted.

You also explain that Mr. Frye previously entered into a conservation easement with the Hardy County Farmland Protection Board, the West Virginia Agricultural Land Protection Authority, and the Cacapon and Lost Rivers Land Trust, Inc (hereinafter the "Grantees"), and the United States, acting by and through the Natural Resources Conservation Service ("NRCS") of the USDA. Mr. Frye's conservation easement restricts the use of his farmland in a number of ways. Relevant here, the deed of conservation easement expressly prohibits Mr. Frye from granting an easement "for the purpose of construction and installation of underground or above-ground utility systems, including, but not limited to, water, sewer, power, fuel, sewerage pumping stations, and cellular telephone and other communication towers."

According to your letter, there is support for and opposition to the proposed fiber optic line. On the one hand, Mr. Frye, the Hardy County Farmland Protection Board, and the Hardy County Rural Development Authority support the approval of a right-of-way easement to allow for the completion of the proposed fiber optic line. On the other hand, you assert that the West Virginia Agricultural Land Protection Authority and the NRCS believe that such a right-of-way is precluded by the terms of the conservation easement.

Your letter raises the following legal question:

> *Does such a farmland easement take away all property rights; deny the agriculture business owners, and adjacent residents and businesses essential public services by denying needed right-of-way easements for a public fiber optic line?*

For several reasons, we conclude that as a general rule, the restrictions of a conservation easement established pursuant to West Virginia Code §§ 20-12-1 and 8A-12-1 are not absolute. As explained below, we have identified at least three instances in the West Virginia Code that create exceptions to such restrictions. Whether such exceptions apply to the particular conservation easement at issue, however, is a question that we cannot answer on the facts presented and is one that, in any event, can be answered definitively only by a court interpreting the document.

First, West Virginia Code § 20-12-5(b) specifically contemplates the modification and/or termination of a conservation easement by a court in certain circumstances. That provision requires that conservation easements "be liberally construed in favor of the grants contained therein to effect the purposes of those easements and the policy and purpose of the Conservation and Preservation Easements Act." It further states, however, that the Conservation and Preservation Easements Act "does not affect the power of a court to modify or terminate a conservation or preservation easement in accordance with the principles of law and equity consistent with the public policy of this article."

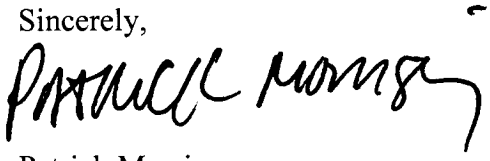
This exception is consistent with long-standing precedent of the West Virginia Supreme Court of Appeals regarding the enforcement of negative restrictive easements. As early as 1920, the Supreme Court of Appeals had opined that the restrictions of negative restrictive easements generally "are recognized and enforced in courts of equity . . . when it clearly appears that the intention of the parties was to limit or restrict the use of one parcel of land for the benefit of another, *provided the enforcement of such restrictions will not violate any principle of public policy*." *Cole v. Seamonds*, 87 W. Va. 19, 20, 104 S.E. 747, 748 (1920) (emphasis added). Conservation easements—which came into existence in 1995 with the passage of the Conservation and Preservation Easements Act—are essentially negative restrictive easements limiting the use of certain property for purposes of preserving the natural and agricultural integrity of the property. *See also* "Some Green for Green in West Virginia: An Overview of the West Virginia Conservation and Preservation Easements Act," 99 W.Va. L. Rev. 617 (1997).

Second, West Virginia Code § 20-12-8 expressly preserves a limited right for an owner of property under a conservation easement to grant rights in the property. Specifically, that provision states that the granting of a conservation easement "shall not subsequently restrict the right of the fee owner to further grant any other interest in real property to any person or entity when the grant *does not materially impair* the prior conservation or preservation easement."

Third, West Virginia law prohibits a conservation easement established under a farmland protection program—such as Mr. Frye's—from abrogating or preventing certain existing and future uses of the land. Pertinent here, West Virginia Code § 8A-12-16(b) generally precludes the commercial, industrial, and residential use of land that is restricted by a conservation easement, but specifically exempts certain "existing and future uses" set forth in other parts of the statute. In turn, West Virginia Code § 8A-12-16(d) provides that farmland protection conservation easement may not "prevent any existing or future use consistent with state law with respect to transmission and telecommunications facilities' rights-of-way, easements and licenses."

Should you have further questions, please do not hesitate to contact this Office.

Sincerely,



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