State of West Virginia
Office of the Attorney General

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May 6, 2014

The Honorable R. Craig Tatterson
Prosecuting Attorney
Mason County
200 6th Street, Room 11
Point Pleasant, WV 25550

Dear Prosecutor Tatterson,

You have asked for an Opinion of the Attorney General regarding the authority of a county commission to lease real property to a private individual. 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 correspondence with the Office of Attorney General.

You explain that the Mason County Commission ("County Commission") has acquired a building and may seek to lease or rent part of the building to a private individual. According to your letter, the County Commission purchased a three-story building located in Point Pleasant, West Virginia. Only the bottom two floors of the building will house the Mason County Sheriff's Department. The top floor of the building contains an apartment with a separate entrance and no access to the bottom two floors. You note that the Mason County Commission has established a Building Commission pursuant to West Virginia Code § 8-33-1.

Your letter raises the following legal question:

Whether the County Commission (on its own or through the county's Building Commission) has the legal authority to lease or rent an apartment to a private individual, presumably for private residential purposes.

As you correctly stated, a county commission is "possessed only of such powers as are expressly conferred by the Constitution and legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given." Syl. Pt. 4, *State ex rel. W. Va. Parkways Auth. v. Barr*, 228 W. Va. 27, 716 S.E.2d 689 (2011) (quoting Syl. Pt. 1, *State ex rel. State Line Sparkler of WV, Ltd. v. Teach*, 187 W.Va. 271, 418 S.E.2d 585 (1992)). *See generally* W. Va. Const. art. 9, § 11 ("Powers of county commissions"). Put another way, a county commission "can do only such things as are authorized by law, and in the mode prescribed." *Id.* Doubts regarding the power granted to a county commission are resolved against finding the existence of such power. *See Exch. Bank of Virginia v. Lewis Cnty.*, 28 W. Va. 273, 286 (1886); *accord* Syl. Pt. 1, *McCallister v. Nelson*, 186 W. Va. 131, 411 S.E.2d 456 (1991).

We conclude that the County Commission has neither express nor implied authority to lease the apartment in question to a private individual to serve as a private residence. To begin with, the West Virginia Code expressly authorizes a county commission to lease real estate in only two specific circumstances—neither of which involves the lease of property to a private individual for private residential purposes. *First*, a county commission may lease real estate to "nonprofit organizations." W. Va. Code § 7-1-3k. "Authorized uses pursuant to this section shall include the granting of meeting places, service outlets and operational headquarters for organizations established within the county." *Id. Second*, a county commission may lease real or personal property "for a public purpose" to an instrumentality of the state or federal government. W. Va. Code § 7-1-3hh.

Furthermore, a county commission does not possess implied authority to lease property to a private individual for private residential purposes. Such authority must be "reasonably and necessarily implied in the full and proper exercise of the powers so expressly given." Syl. Pt. 4, *Barr*, 228 W. Va. 27, 716 S.E.2d 689. In other words, "power by implication must be based upon some express statutory authority." *State ex rel. Cnty. Court of Cabell Cnty. v. Arthur*, 150 W. Va. 293, 297, 145 S.E.2d 34, 37 (1965). As noted, the two powers "expressly given" relating to leasing include the authority to lease to nonprofit organizations and to state and federal governments for a public purpose. *See* W. Va. Code §§ 7-1-3k, 7-1-3hh. The power to lease property to a private individual for a private residential purpose is neither "reasonably" nor "necessarily implied" in the full exercise of these two express powers, which are themselves specific and limited.

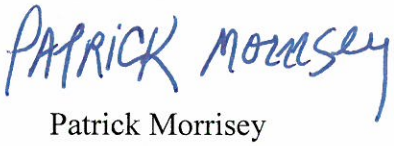
The existence of the Building Commission does not change the conclusion. Even assuming that it is the Building Commission ("Building Commission")—and not the

County Commission—that seeks to lease the property, the Building Commission also lacks the power to lease property to a private individual for a private residential purpose. West Virginia Code § 8-33-4 defines the powers of building commissions. In pertinent part, that section provides that a building commission may "[l]ease its property or any part thereof, *for public purposes*, to such persons and upon such terms as the commission deems proper. . . ." *Id.* (emphasis added).

We do not believe that the contemplated lease of an apartment as a private residence falls within the Building Commission's power to lease property "for public purposes." Although "public purpose" is not defined in the statute, the Supreme Court of Appeals has addressed the concept in other contexts before. *See State ex rel. City of Charleston v. Coghill*, 156 W. Va. 877, 207 S.E.2d 113 (1973); *see also State ex rel. W. Va. Citizens Action Grp. v. W. Va. Econ. Dev. Grant Comm.*, 213 W. Va. 255, 278-79, 580 S.E.2d 869, 892-93 (2003) (discussing public purpose doctrine). In *Coghill*, the Court discussed the phrase in connection with a statutory provision that expressly authorized the allocation of space within a municipal public parking facility for sale or lease to private individuals for commercial, business, or charitable purposes. *See* W. Va. Code § 8-16-4a(b). The Court explained that if a government action has "as its primary and dominant purpose the conferring of private benefits, with only ancillary public benefits," the government is not acting for a public purpose. *See Coghill*, 156 W. Va. at 884, 207 S.E.2d at 118. The lease contemplated in your letter would not appear to satisfy the *Coghill* test.

In sum, we conclude that no authority permits a county commission or building commission to lease property to a private individual for a private residential purpose. Should you have further questions, please do not hesitate to contact this Office.

Sincerely,



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