



STATE OF WEST VIRGINIA
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August 2, 1993

The Honorable W. Gaston Caperton
Office of the Governor
State Capitol
Charleston, West Virginia 25305

The Honorable Larrie Bailey
Office of the Treasurer
Building 1, Room E-145
State Capitol
Charleston, West Virginia 25305

The Honorable Ken Hechler
Secretary of State
Building 1, Room 157K
State Capitol
Charleston, West Virginia 25305

Re: Appointment of Members to the
State Building Commission of
West Virginia

Dear Gentlemen:

It is our understanding that at a meeting of the State Building Commission held on July 20, 1993, the Commission voted to request an Opinion from this Office as to whether or not gubernatorial appointees to the State Building Commission who have not yet been confirmed by the West Virginia State Senate should formally participate in the business and activities of the State Building Commission. To date this Office has not received a written request for an Opinion. This Office has also been advised that it may be many weeks before the minutes of the July 20, 1993 meeting of the State Building Commission are transcribed.

The brief answer to the question presented is that appointments to the State Building Commission are not complete until the advice and consent of the Senate has been given. Until this is done, appointees are not legally entitled to serve in the position of members of the State Building Commission.

In rendering this Opinion, we must be mindful that the question presented comes to us in the abstract. The reader must recognize the risk in predicting how courts may choose to construe specific facts and how they choose to apply the facts to the law. Inasmuch as we render Opinions without memoranda and argument representing diverse points of view, we are constrained to approach matters conservatively.

THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

The Constitution of West Virginia provides in pertinent part that "the governor shall nominate, and by and with the advice and consent of the senate, . . . appoint all officers whose offices are established by this Constitution, or shall be created by law, and whose appointment or election is not otherwise provided for" W. Va. Const. art. VII, § 8. Plainly, this provision vests in and reserves to the Legislature, in situations not provided for in the Constitution, the plenary power to prescribe through general law the terms of office, power, duties and the manner of election or appointment of public officers and agents. See, e.g., State ex rel. Fox v. Brewster, 140 W. Va. 235, 84 S.E.2d 231; Bridges v. Shallcross, 6 W. Va. 562 (1873).

The State Building Commission is a creature of statute and the plenary power of the Legislature. W. Va. Code §§ 5-6-1 through 5-6-8 (1990 Repl. Vol. and 1992 Cum. Supp.). The members of the State Building Commission consist of "the governor, attorney general, state treasurer, and four additional members to be appointed by the governor by and with the advice and consent of the Senate." W. Va. Code § 5-6-1 (1990 Repl. Vol. and 1992 Cum. Supp.) (Emphasis added).

Without question, the appointment of the four members to the State Building Commission is not complete until the "advice and consent of the Senate" has been given. The law plainly is that appointees to public office, in situations in which confirmation of the appointment is required by general law, have no right to hold office until after the appointment is confirmed. See, e.g., Hockman v. Tucker County Court, 138 W. Va. 132, 75 S.E.2d 82 (1953); 63A Am. Jur. 2d Public Officers and Employees, §§ 117, 119. To conclude otherwise, would usurp the power and duty of the Legislature which specifically provided for approval by the Senate of the governor's appointments to the State Building Commission.

THE PRESENT FACTUAL CIRCUMSTANCES AND LEGAL CONSEQUENCES.

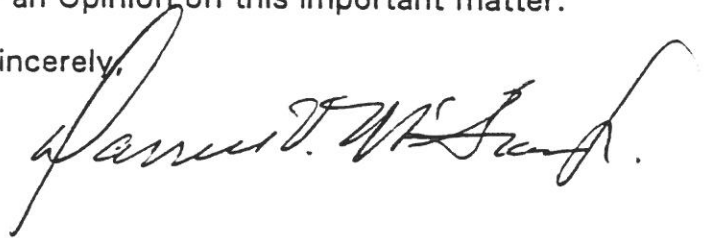
It is our understanding that Governor Caperton recently appointed two individuals to serve as members of the State Building Commission. The individuals have not been confirmed by the Senate as the law clearly requires. Nevertheless, these two individuals attended the July 20, 1993 meeting of the State Building Commission. The two participated in the meeting and participated in voting on matters before the State Building Commission.

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Such participation is wholly unlawful. The acts participated in by the nonconfirmed individuals are null and void.

We appreciate the opportunity to render an Opinion on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert T. W. Smith". The signature is written in a cursive style with a large, sweeping initial "R".

DVM/jak

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