



State of West Virginia
Office of the Attorney General

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February 7, 2022

The Honorable Kent A. Leonhardt
Commissioner
West Virginia Department of Agriculture
1900 Kanawha Blvd. E.
Charleston, WV 25305

Dear Commissioner Leonhardt:

You have asked for an Opinion of the Attorney General about whether last year's amendment of West Virginia Code § 19-12A-5(c)(4) (effective July 5, 2021) grants you authority to cancel the two leases at issue in the 2017 opinion letter our Office issued at your request. This Opinion is being issued under 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 commissioner of agriculture." To the extent this Opinion relies on facts, it is based solely on the factual assertions in your correspondence with the Office of the Attorney General.

On April 26, 2017, our Office issued a legal opinion in response to your queries about two long-term leases for real property that your predecessor signed in January 2017—after your election but before the start of your elected term. *See Op. W. Va. Att'y Gen. (Apr. 26, 2017) ("April 2017 Opinion")*. The leases involve institutional farm property under the West Virginia Department of Agriculture's control, purposed for economic development under West Virginia Code § 19-12A-5(c)(1). Both leases involve annual consideration of \$1 per acre. And both leases contain the following provision:

Lessee understand[s] that the lease can be cancelled without further obligation if the legislature fails to appropriate sufficient funds or otherwise acts to impair the lease or causes it to be cancelled.

Our April 2017 Opinion concluded that your predecessor “possessed the constitutional authority to enter into the leases in question” at the time he did, and that you did “not have any inherent authority to unilaterally cancel existing contracts entered into on behalf of the State by prior administrations.” April 2017 Opinion at 2-5. The Opinion also suggested that “the contracts themselves provide one possible alternate avenue for cancellation or revocation—through an act of the State Legislature.” *Id.* at 4. We suggested that your office might “propose legislative rules that could be adopted by the State Legislature to cancel the existing leases,” or that “the Legislature could on its own initiative enact a statute to that effect.” *Id.* at 5.

On April 28, 2021, Governor Justice signed into law House Bill 2633, which made the following change to W. Va. Code §19-12A-5:

(c) The commissioner [of agriculture] is hereby authorized and empowered to:

* * *

(4) Upon 30 days written notice to the lessee, cancel a lease to which the department is a party and which is for annual consideration of less than \$5 per acre: *Provided*, That such lease must contain a provision authorizing cancellation or impairment by the Legislature

H.B. 2633, 85th Leg., Reg. Sess. (W. Va. 2021). The amendment went into effect on July 5, 2021. *See id.*

Your letter raises the following legal question:

Did the Legislature “act[] to impair” the two leases at issue by amending West Virginia Code § 19-12A-5 to “authorize[] and empower[]” the Commissioner to cancel the leases at his discretion after 30 days written notice?

We conclude that it did. A lease subject to unilateral, discretionary cancellation has less value than one that is not, and so the amendment satisfies the leases’ caveat for legislative actions that “impair” a lease.

Discussion

We have no reason to doubt that each lease at issue here is “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language.” *Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 298, 332 S.E.2d 597, 598 (1985) (citation omitted). Thus, the leases are “not subject to judicial construction or interpretation” and should be “applied and enforced according to such intent.” *Id.* By signing these leases, each lessee stated its “understand[ing] that the lease can be cancelled without further obligation if the legislature”—presumably the West Virginia Legislature, though not explicitly defined—“fails to appropriate sufficient funds,” “acts to impair the lease,” or “causes [the lease] to be cancelled.”

Nothing in your letter suggests that any fund-appropriation decision by the Legislature has affected these leases. And we do not consider the change to Section 19-12A-5(c)(4) to be an “act[]” by the Legislature that *itself* “causes” the leases “to be cancelled.” Section 19-12A-5(c) addresses only what the Commissioner is “authorized and empowered to” do; it does not require the Commissioner to take affirmative action. The question we are left with, then, is whether the Legislature’s change to Section 19-12A-5(c)(4) can be considered an “act[] to impair the lease[s]” at issue here. We conclude that it can.

The contractual terms “cancel[]” and “impair” are each “presumed to have a unique meaning and, thus,” neither term “is to be treated as a redundancy.” Syl. pt. 6, *Columbia Gas Transmission Corp. v. E.I. du Pont de Nemours & Co.*, 159 W. Va. 1, 2, 217 S.E.2d 919, 920-21 (1975). In other words, the lessees agreed that this contractual provision could be triggered by an act of the Legislature either to cancel the lease *or* to impair it—outright cancellation and actions less severe can qualify equally.

“Impair” means “[t]o diminish the value of (property or a property right),” as in “diminishing the value of a contractual obligation to the point that the contract becomes invalid or a party loses the benefit of the contract.” *Impair*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also impair*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/impair> (last visited Feb. 7, 2022) (“to diminish in function, ability, or quality; to weaken or make worse”). The language the Legislature added to Section 19-12A-5(c)(4) “is free from ambiguity,” so this “plain meaning is to be accepted and applied without resort to interpretation.” *State v. Ward*, 245 W. Va. 157, 858 S.E.2d 207, 211 (2021) (quoting syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)).

By authorizing and empowering the Commissioner to cancel these and other qualifying leases “[u]pon 30 days written notice,” W. Va. Code § 19-12A-5(c), the Legislature has “diminish[ed] the value of [the] property or property right” lessees would otherwise enjoy “to the point that ... [they] lose[] the benefit of the contract.” *Impair*, BLACK’S LAW DICTIONARY (11th ed. 2019). Indeed, the Legislature made its intent to “impair” such leases especially clear by requiring leases subject to the Commissioner’s new authority to “contain a provision authorizing cancellation or *impairment* by the Legislature.” W. Va. Code § 19-12A-5(c)(4) (emphasis added). Linking the statute to this contractual term underscores that the Legislature knew what it was doing: The amendment “impair[ed]” qualifying contracts.

Finally, we note that this Opinion analyzes only whether the change to Section 19-12A-5 impaired the two leases on the facts you provided us. It is beyond the scope of this Opinion whether the statute itself might be subject to any potential challenges.

In short, we conclude that the change to West Virginia Code § 19-12A-5(c)(4) constitutes a legislative “act[] to impair the lease[s].” Under the leases’ express terms, this means they “can be cancelled without further obligation.”

Hon. Kent A. Leonhardt

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Sincerely,

A handwritten signature in blue ink that reads "Patrick Morrissey". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey
Attorney General

Lindsay See
Solicitor General