



State of West Virginia
Office of the Attorney General

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The Honorable Jeffrey R. Roth
Prosecuting Attorney
Office of the Grant County Prosecuting Attorney
5 Highland Avenue
Petersburg, WV 26847

Dear Prosecutor Roth:

You have asked for an Opinion of the Attorney General regarding a contract the Grant County Commission executed in 2004 for the purchase of real property for siting a telecommunications tower for the County's 911 system. 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 upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your letter raises a number of legal issues, which are addressed in turn below:

(1) May certain restrictive covenants, or parts of those restrictive covenants, from a contract that the Grant County Commission executed in 2004 be voided? (2) Assuming the restrictive covenant is enforceable, what is the scope of the restriction? (3) Would a development board member who facilitated various contracts on behalf of the development board and a private internet company have had a conflict of interest?

Question 1: May Certain Restrictive Covenants, or Parts of Those Restrictive Covenants, From a Contract That the Grant County Commission Executed in 2004 Be Voided?

According to your letter and accompanying documentation, the Grant County Commission in 2004 agreed to purchase a 0.294 acre plot of land on Charles Knob Mountain ("Charles Knob parcel") from Beacon Net LLC ("Beacon Net") for \$30,000 for the purpose of acquiring a site on which the County could erect a hub cell tower to support the County's planned 911 system. As an apparent result of this agreement, the real estate was conveyed and the telecommunications tower was constructed ("Charles Knob tower"). But in 2015, the Commission realized that the 2004 contract, which was incorporated by reference into the deed, restricts the County from placing any antennae on the Charles Knob tower other than those needed to operate the 911 system. Specifically, the restrictive covenant provides:

The [Commission] agrees that the 0.294 acre parcel to be purchased from [Beacon Net] will be used for the limited purpose of transmitting and receiving radio signals necessary for the operation of the County's Emergency 911 system. . . . Any use beyond what is necessary to operate the 911 system, including the providing or leasing of space, with or without consideration, on any tower or towers owned by the [Commission], that is not directly related to the 911 system is not permitted.

We understand that the Commission now believes that the restrictive covenant "unfairly penalizes the public" by preventing the public from "receiving proper cell phone coverage in [the] county." The Commission asks whether the covenant can now be voided without affecting the underlying conveyance, so that the Commission can provide increased cell service and wireless internet access to the citizens of Grant County. As such, our response is limited only to whether the Commission may void the restrictive covenant.

Under the facts you provided, the restrictive covenant is probably enforceable on its plain terms. "The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish." Syl. Pt. 2, *Allemong v. Frenzel*, 178 W. Va. 601, 602, 363 S.E.2d 487, 488 (1987) (citing *Wallace v. St. Clair*, 147 W.Va. 377, 390, 127 S.E.2d 742, 751 (1962)); Syl. Pt. 3, *Jubb v. Letterle*, 185 W. Va. 239, 240, 406 S.E.2d 461, 466 (1991) (citations omitted).

The plain language in the contract and deed demonstrates without ambiguity that the Commission intended to purchase the Charles Knob parcel solely for the purpose of facilitating the County's 911 emergency facilities. The contract begins with a statement that the "Purchaser"—the "County Commission of Grant County"—"desires to buy said lot for the purpose [sic] constructing and operating a radio tower for use as apart [sic] of the County's Emergency 911 system." The contract then includes several express restrictions on the use of land the Commission purchased. The Commission's use of the Charles Knob parcel is "limited [to the] purpose of transmitting and receiving radio signals necessary for the operation of the County's Emergency 911 system," and "[a]ny use beyond what is necessary to operate the 911

system . . . is not permitted.” The contract expressly prohibits “outside agencies” from “attach[ing] antennae to the [Commission’s] tower.” The deed conveying the real estate states that “the terms, provisions, and conditions identified and set forth in the aforesaid contract of July 27, 2004, shall survive this deed and be binding upon the parties hereto, including their successors and assigns.”

Although the Supreme Court of Appeals has identified exceptions to the enforcement of unambiguous restrictive covenants, the exceptions probably do not apply under the facts you provided. “While the courts have manifested some disfavor of covenants restricting the use of property, they have generally sustained them where reasonable, not contrary to public policy, not in restraint of trade, and not for the purpose of creating a monopoly.” *Wallace*, 147 W. Va. at 387, 127 S.E.2d at 750 (internal quotations omitted); *see also Allemong v. Frenzdel*, 178 W. Va. 601, 603, 363 S.E.2d 487, 489 (1987) (upholding covenant that “prohibit[ed] selling alcoholic beverages on the parcel of land”); *McIntyre v. Zara*, 183 W. Va. 202, 206, 394 S.E.2d 897, 901 (1990) (suggesting that “prohibitions against subdividing and using a contractor other than Skyline Contracting” would be permissible if “reasonably designed” to “establish a residential area” and “no broader than necessary to accomplish that purpose”).

We have not found any cases in West Virginia applying these exceptions to void an unambiguous covenant like the one presented here, and cases from other jurisdictions appear to uphold covenants that have the effect of limiting access to telecommunications services. In *Morgenbesser v. Aquarion Water Co. of Conn.*, 888 A.2d 1078 (Conn. 2006), the Connecticut Supreme Court considered a covenant that “limit[ed] the use of [a] property to ‘water supply purposes or purposes incidental or accessory thereto.’” *Id.* at 826. Rejecting the argument of those who sought to erect a telecommunications tower, the court held that “the fact that the use of the property to operate a wireless communications facility might advance the public policy favoring universal access to telecommunications services does not permit this court to ignore the clear and unambiguous language of the restrictive covenant prohibiting such a use.” *Id.* at 1082-83. Similarly, New York’s highest court rejected an attempt to invalidate a covenant because there were other sites available on which to install the desired telecommunications tower. *See Chambers v. Old Stone Hill Rd. Assoc.*, 806 N.E.2d 979, 982 (N.Y. 2004) (restrictive covenant did not violate public policy because it “in no way denie[d] wireless telecommunications services in the [t]own”); *see also SiteTech Grp. Ltd. v. Bd. of Zoning Appeals*, 140 F. Supp. 2d 255, 264–265 (E.D.N.Y. 2001) (upholding a zoning board’s denial of a special permit on the ground that there were alternative sites even though the alternative sites would not have completely closed the gaps in service and would have required additional antennas). Based on the facts you provided, there is no indication that the Charles Knob parcel is the only site on which the Commission could erect a tower that would provide telecommunications services to the citizens of Grant County.

Question 2: Assuming the Restrictive Covenant Is Enforceable, What Is the Scope of the Restriction?

Your letter and included documentation also seek guidance regarding the scope of the restrictive covenant. Specifically, you ask about the fact that the covenant prohibits “[a]ny use

beyond what is necessary to operate the 911 system . . . on any tower or towers owned by the [Commission].” You relate that the Commission has expressed concerns that the use of the plural “towers” in the restrictive covenant could be read to limit *all* of the County’s present and future towers anywhere in the county, not just the tower (or any future towers) on the Charles Knob parcel.

In our view, the plain language of the restrictive covenant applies only to the tower or any future towers on the Charles Knob parcel and not to towers located on any other real estate. As noted, the plain language of the provision controls as the best indication of the intentions of the parties. See Syl. Pt. 4, *Zimmerer v. Romano*, 223 W. Va. 769, 772, 679 S.E.2d 601, 604 (2009). The contract at issue, which contains the restrictive covenant, concerned *only* the purchase of the Charles Knob parcel. Fairly read, no language in the restrictive covenant or the agreement and subsequent deed suggests an intention to restrict the Commission’s towers on any other real estate. See *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996) (“If language in a contract is found to be plain and unambiguous, such language should be applied according to such meaning.”). But even if the covenant were somehow ambiguous, a court would strictly construe any ambiguity against the grantor—here, Beacon Net. See *Allemong*, 178 W. Va. at 605, 363 S.E.2d at 491.

Question 3: Would a Development Board Member Who Facilitated Various Contracts on Behalf of the Development Board and a Private Company Have Had an Unlawful Conflict of Interest?

You also request an advisory opinion as to whether Mr. James M. Cookman had an unlawful conflict of interest regarding the facilitation and execution of the contract resulting in the conveyance of the Charles Knob parcel. The contract at issue involves the Commission’s purchase of the Charles Knob parcel from Beacon Net LLC in 2004, as already discussed. You indicate that Cookman—one of four owners of Beacon Net—signed the purchase contract and deed on behalf of Beacon Net. But according to your letter, Cookman was also a member of the Grant County Development Authority at the time he executed the contract. The documents you sent indicate that Cookman’s positions would have given him “inside” knowledge of the Commission’s desire to purchase land for a 911 cell tower prior to the agreement to purchase the Charles Knob parcel.*

We believe this question is best answered in the first instance by the West Virginia Ethics Commission, which has statutory authority over ethical questions and is empowered to “initiate or receive complaints and make investigations . . . of an alleged violation of [the West Virginia Governmental Ethics Act] by a public official or public employee.” *Id.* § 6B-2-2(b). Among other things, the Ethics Act defines and establishes minimum ethical standards for elected and appointed public officials and public employees. See W. Va. Code § 6B-1-1, *et seq.*; see also *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 233-34, 744 S.E.2d 625, 631-

* The members of a county development authority are appointed by the county commission, and at least one commissioner must be a member of the county development authority. See W. Va. Code § 7-12-3.

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32 (2013). It establishes administrative civil and criminal penalties for public officials and employees who “exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position,” W. Va. Code § 6B-1-2; *Discover*, 744 S.E.2d at 631-32 (citing W. Va. Code § 6B-1-2(a)), and applies “to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards,” *id.* § 6B-2-5(a).

Sincerely,



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