



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
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SECRETARY OF STATE

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November 5, 2007

The Honorable Betty S. Ireland
Secretary of State
Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Re: Approval of State Armory Board Deeds by the Board of Public Works

Dear Secretary Ireland:

On behalf of the West Virginia Board of Public Works, you have requested an official opinion from this Office as to whether real estate transactions between the State Armory Board and other public bodies are exempt from approval by the Board of Public Works. It is our opinion that the acquisition and disposition of real property by and between the State Armory Board and other public bodies is subject to approval by the Board of Public Works.

The Relevant Powers of the Board of Public Works

The members of the Board of Public Works are the six elected officers who form the Executive Department (W. Va. Const. art. VII, § 1), together with the State Superintendent of Schools. W. Va. Code § 5-4-1. By statute, the Board of Public Works "shall have the powers and perform the duties prescribed for it by law." *Id.* It is the primary, if not the only, forum for concerted action by the constitutionally created Executive Department.

Among the statutory powers of the Board of Public Works is the power to approve real estate transactions between the State and other public bodies. West Virginia Code Section 1-5-3, enacted in 1968, empowers all public bodies¹ to engage in real estate transactions with one another, as follows:

¹West Virginia Code § 1-5-2 defines "public body" to include "the state of West Virginia, its agencies, departments, boards and commissions of whatever description, county courts or tribunals in lieu thereof, county boards of education, incorporated municipalities or any other political subdivisions."

Any public body is hereby authorized and empowered to acquire by purchase, transfer or exchange any real property owned by any other public body, and any public body is hereby authorized and empowered to dispose of by sale, transfer or exchange to or with any other public body any real property owned by it, any such acquisition or disposition to be upon such terms and conditions as may be agreed upon by and between the public bodies. . . . *Provided, That any acquisition or disposition by the state, or any agency, department, board or commission thereof, must first be approved in writing by the board of public works.*

(Italics supplied.)

Requiring such transactions to be approved by the Executive Department is consistent with the policy, evident in the State Constitution, of distributing executive authority among several accountable elected officials in a plural executive department, so as to promote justice and secure individual liberties through the diffusion of governmental power:

Unlike the federal government, where essentially the entire executive power is vested in one elected officer, our *State Constitution* apportions executive power among several elected officers. These offices, each operating in some respects independently, must combine and cooperate (even if they have differing policy views and perspectives) to provide an efficient and effective executive branch of government.

State ex rel. McGraw v. Burton, 212 W. Va. 23, 33, 569 S.E.2d 99, 109 (2002).

The 1968 legislation requiring that the Board of Public Works approve public real estate transactions includes the following language (although our opinion is not based thereon): "All acts or parts of acts which are inconsistent with the provisions of this article are hereby repealed to the extent of such inconsistency." W. Va. Code § 1-5-4.

The State Armory Board

West Virginia Code Title 15, Article 6, enacted in 1957, vests authority in the State Armory Board for the development, construction, financing and disposition of state armories for the use of the National Guard. The members of the State Armory Board are the Governor, the Secretary of State and the State Auditor, all of whom are also members of the Board of Public Works. Among its various powers, the State Armory Board is authorized by West Virginia Code § 15-6-6(g) "[t]o acquire, hold and dispose of real and personal property in the exercise of its powers and for its corporate purposes."² Pursuant to West Virginia Code § 15-6-12, "[t]itle to all property, armories

²In 1999, many of the powers of the State Armory Board with respect to armory projects, other than those projects encumbered by bonded indebtedness or dedicated revenue restrictions, were transferred to the Adjutant General by West Virginia Code § 15-6-6a. We have not been asked, and

and armory projects, upon delivery and acceptance, shall vest in the State and shall be held in the name of the State.”

West Virginia Code § 15-6-14 authorizes the State Armory Board to acquire interests in real property “upon such terms and at such price as may be considered by it to be reasonable,” or “by the exercise of the power of condemnation.” In disposing of unneeded properties, the Armory Board must first offer said properties to the municipality, county or board of education wherein the property is located and “upon such terms as the board may deem to be in the best interest of the State.” W. Va. Code § 15-6-17. If the local governing bodies do not purchase the property, “the board shall then be authorized to sell, transfer and convey the same to any person, firm, or corporation upon such terms as the board may deem to be in the best interest of the State.”

Of particular interest regarding the Armory Board’s powers is West Virginia Code § 15-6-20, which provides :

It shall not be necessary [for the Armory Board] to secure from any officer or board not named in this article any approval or consent, or any certificate or finding, or to hold an election, or to take any proceedings whatever, either for the construction of such project, or the improvement, maintenance, operation, or repair thereof, or for the issuance of bonds hereunder except such as are provided by this article or are required by the Constitution of the State.

Discussion

Your question arises because of the broad discretion apparently delegated to the Armory Board by the above statutes, including the discretion to acquire property “upon such terms and at such price as may be considered by it to be reasonable,” and to determine whether a proposed conveyance of unneeded armory property is “in the best interests of the State.” W. Va. Code §§ 15-6-14 and -17. If such discretion is construed to be inconsistent with, or in conflict with, the power of the Board of Public Works to approve real estate transactions with the State, we would have to resort to principles of statutory construction designed to resolve such conflicts. We are reluctant to do so, however, because statutes dealing with the same subject matter must, if possible, be construed so as to avoid conflict, the Legislature presumably being aware of existing law when it enacts other statutes relating to the same subject matter.

²(...continued)

express no opinion on, whether the Adjutant General was thereby granted any of the Armory Board’s powers to acquire and dispose of real estate. If such powers were granted, they would, nonetheless, be subject to approval by the Board of Public Works to the same extent as transactions by the Armory Board.

[A] court must, whenever possible, read statutes dealing with same subject matter *in pari materia* so that the statutes are harmonious and congruent, giving meaning to each word of the statutes, and avoiding readings which would result in conflict in the mandates of different statutory provisions.

Mangus v. Ashley, 199 W. Va. 651, 656, 487 S.E.2d 309 (1997).

Many other State agencies likewise enjoy specific authority to acquire and dispose of real property, including the Division of Highways (W. Va. Code § 17-2A-19), the Division of Natural Resources (W. Va. Code § 20-1-7), the State Rail Authority (W. Va. Code § 29-18-6), and the Regional Jail and Correctional Facility Authority (W. Va. Code § 31-20-5). We are unaware of any claim that such agencies are thereby exempt from review by the Board of Public Works as to transactions involving other public bodies.

It is a simple matter to construe the statutes at issue here in a harmonious fashion. At the outset, we would note that the approval authority of the Board of Public Works is specific to transactions between public bodies. It does not purport to apply to Armory Board transactions with private parties. As to real estate transactions between public bodies, it is not only the Armory Board that enjoys substantial discretion – *all* public bodies enjoy that discretion. The same statute that requires real estate transactions with the State to be approved by the Board of Public Works clearly states that the terms and conditions thereof shall be determined by agreement of the parties to the transaction. W. Va. Code § 1-5-3. The discretion granted to the Armory Board to determine the terms and conditions of its real estate transactions with other public bodies is no different than the authority that all other State agencies enjoy by virtue of West Virginia Code § 1-5-3. Given that substantial discretion is afforded to all public bodies within the same statute that requires approval by the Board of Public Works, such discretion cannot be deemed to be in conflict with that approval authority. The role of the Board of Public Works becomes that of oversight. In short, the Armory Board and other State agencies are responsible for negotiating the terms and conditions of their real estate transactions, but such terms and conditions are subject to approval by the Board of Public Works if, and only if, that transaction involves another public body.

This does not render meaningless the specific authority granted to the Armory Board and certain other State agencies. The specific authority to engage in real estate transactions allows them, unlike many other State agencies, to do so with *private* parties. Thus, the language authorizing the Armory Board to engage in real estate transactions is not mere surplusage. It serves a distinct purpose.

It is true that the 1957 Armory Board enactment contains the provision, quoted above, indicating that the Armory Board can act with respect to the construction, improvement, maintenance, repair or operation of armory projects without any approvals or constraints except those imposed by that enactment or the Constitution. W. Va. Code § 15-6-20. However, it is by no means clear that this "exemption" for armory projects includes the acquisition or disposition of real property, as such transactions are not expressly mentioned. To imply their presence, perhaps by construing the word "construction" to include the acquisition of property, should be avoided if it

would create a conflict that otherwise would not exist.³ *Mangus, supra*. Further, there is no term within said “exemption” that could fairly imply that the power to *dispose* of unneeded property was exempted.

It should be noted that the 1968 enactment empowering the Board of Public Works to approve real estate transactions between the State and another public body purports to “repeal” any inconsistent statutory provisions. W. Va. Code § 15-6-20. Such general “repealer” clauses are, in our view, very problematic. The Legislature is presumed to be cognizant of all prior enactments governing the same subject matter when it enacts a statute. *Harbert v. Harrison County Court*, 129 W. Va. 54, 75, 39 S.E.2d 177, 191 (1946). That is the premise behind the presumption that statutes dealing with the same subject matter are consistent with one another. If aware of its own prior enactments, the Legislature would amend or *specifically* repeal any preexisting statutes that were in conflict with the Legislative purpose of the newer enactment.

To rely upon a blanket “repealer” clause is tantamount to a conclusion that the Legislature did *not* have complete knowledge of its own prior enactments, and would distastefully suggest that the Legislature abdicated its responsibility to examine prior enactments on the same subject. That is why a general repealer clause is no different than the disfavored concept of “repeal by implication.” See *Harmon v. Fayette County Bd. of Educ.*, 205 W. Va. 125, 128, 516 S.E.2d 748,

³The statutory term, “project,” is defined to include the acquisition of property rights as well as the construction, improvement, maintenance and repair of armory buildings, roads, and other facilities. W. Va. Code § 15-6-3(d). The activities exempted from approval by W. Va. § 15-6-20, however, are limited to construction, improvement, maintenance, operation, and repair, without mentioning the acquisition of property rights. Consequently, this omission stands out as intentional. Similarly, the exclusion of “pharmacies” from the list of services included in a statutory definition of “health care provider” was recently deemed to be “intentional”:

The list does not include pharmacies, and this Court has previously recognized that “[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.”

Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W. Va. 484, 647 S.E.2d 920, 928 (2007) (citations omitted).

If the word “project,” as used in the exemption, was intended to imply all aspects of the statutory definition of “project,” including the acquisition of property, the Legislature need not have specifically exempted all the *other* activities included in the definition, such as construction and maintenance. The list of specifically exempted activities would then be mere surplusage. Such a construction would violate the rule that statutes should be construed to give meaning to every word. “It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.” *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979).

751(1999) (characterizing a general repealer statute as a "repeal by implication"). "Repeal of statutes by implication is not favored and can arise only in cases of irreconcilable conflict or inconsistency." *Smith v. Siders*, 155 W. Va. 193, 201, 183 S.E.2d 433, 437 (1971); *see also Rite Aid of West Virginia, Inc. v. City of Charleston*, 189 W. Va. 707, 709, 434 S.E.2d 379, 381 (1993) (repeal by implication may be invoked only when the prior statute is "irreconcilable" with the latter).

In our view, a general "repealer" clause serves merely as a blunt reminder that prior statutes should be construed in a manner consistent with the newer statute so as to avoid the repugnant alternative – repeal by implication. In this case, the statutes authorizing the Armory Board to engage in real estate transactions were enacted only eleven years prior to the statutes requiring approval of some such transactions by the Board of Public Works. To find the two statutes to be "irreconcilable" would be an unwarranted insult to the Legislative process. We, thus, presume that the Legislature perceived the two statutory schemes to be consistent with one-another.

In conclusion, it is the opinion of this Office that deeds between the State Armory Board and other public bodies must be approved by the West Virginia Board of Public Works pursuant to West Virginia Code § 1-5-3.

Very truly yours,

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ATTORNEY GENERAL

By:



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