



State of West Virginia
Office of the Attorney General

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The Honorable Robert E. Ryan
Hardy County Prosecuting Attorney
204 Washington Street
Moorefield, WV 26836

Dear Prosecutor Ryan:

You have asked for an Opinion of the Attorney General about whether the Hardy County Commission can create a general community development fund in a proposed Payment In Lieu of Taxes (PILOT) agreement.

This Opinion is being issued under 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.” When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence and discussions with the Office of the Attorney General.

You explain that a private, for-profit developer has proposed developing a 2,000-acre solar power project with a 500-acre industrial park on county-owned property. The developer will initially acquire the property for and build the solar project. The County Commission will then buy it and lease the project back to the developer. Once those transactions are complete, the project will become eligible for tax-exempt status consistent with West Virginia Code § 8-19-4.

The developer has submitted a draft PILOT agreement to the County Commission and Board of Education. Under the agreement, the county will deem the project exempt from property taxes. And instead of paying taxes, the developer will make PILOT payments according to a set schedule. The draft agreement also requires the developer to contribute to a “community development fund” in addition to the PILOT payments. The Hardy County Commission will establish and control this fund, using it at its discretion to address community needs consistent with the Commission’s public purpose, such as funding emergency ambulance and law enforcement services.

With these facts in mind, your letter raises the following legal questions:

- (1) *Can the County Commission create a discretionary-use community development fund?*
- (2) *If yes, should the County Commission include terms related to community development fund in the PILOT agreement?*

As a threshold matter, we conclude that the County Commission has the authority to enter into a PILOT agreement with the developer. West Virginia law expressly gives county commissions this authority, so the PILOT agreement is permissible provided the County Commission follows all the statutory requirements. Next, the County Commission is statutorily authorized to set up a community development fund, although funds should be remitted first to the general fund. Lastly, the County Commission should oblige the developer to make contributions in a separate agreement, not in the PILOT Agreement.

DISCUSSION

I. The County Commission May Enter Into A PILOT Agreement With The Private Developer.

To start, the County Commission may enter into a PILOT Agreement like the draft provided.

As with all county commissions, the Hardy County Commission is “created by statute, and 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. 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. IX, § 11 (“Powers of county commissions”). Although county commissions have limited powers, when they do have a power, the commissions are “vested with a wide discretion” in its execution. Syl. pt. 1, *Cnty. Comm’n of Greenbrier Cnty. v. Cummings*, 228 W. Va. 464, 720 S.E.2d 587 (2011). Thus, where a county commission has broad express powers, it enjoys substantial implied authority as well. *See, e.g., State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 283, 507 S.E.2d 376, 384 (1998) (finding implied authority to employ security personnel at a statutorily required judicial facility).

PILOT agreements fall within a county commission’s express powers. West Virginia Code § 8-19-4 says that “[w]henever a ... county commission ... decides to acquire, by purchase or otherwise, construct, establish, extend or equip ... an electric power system,” then “the real and personal property ... shall be considered public property and shall be exempt from taxation.” The exemption extends to a county’s lessees, too. *Id.* § 8-19-4 (“[T]his exemption shall be applicable to any leasehold ... held by persons other than a ... county” where all interested governmental entities agree). Where a county leases the project to a third party, “payments made [by the lessee] ... in lieu of tax pursuant to such an agreement shall be distributed as if the payments resulted from *ad valorem* property taxation.” *Id.* So this statute expressly authorizes county commissions to enter into PILOT agreements.

The draft agreement appears to comply with the statutory requirements for PILOT agreements. *First*, a PILOT agreement must pertain to an “electric power system.” *Id.* An “electric power system” is “a system or facility which produces electric power in its entirety or provides for the distribution of electric power for local consumption and use or for distribution and resale.” *Id.* § 8-19-1. A solar panel farm satisfies this definition because it produces electric power in its entirety.*

Second, the property must be “considered public property” and owned by the “municipality or county.” *Id.* § 8-19-4. Your letter indicates that the proposed solar project would be located on land owned by the county.

Third, the electric power system must be “acquired or constructed with the written agreement of the county school board, county commission, and any municipal authority within whose jurisdiction the electric power system is.” *Id.* § 8-19-4. Section 3.01 of the draft agreement provides that “[t]he Commission, County Board, the Sheriff, and the Assessor ... each ... agree[] to the acquisition, construction, and equipping of the [p]roject.” So this demand is met, too.

Fourth, where a lease exists, PILOT payments “shall be distributed as if the payments resulted from *ad valorem* property taxation.” W. VA. CODE § 8-19-4. The draft agreement enshrines this statutory obligation. Section 4.05 provides that the Sheriff must “dispos[e] of any amount paid in lieu of tax by [the developer] as if the same were paid as *ad valorem* property taxes.”

Separately, it does not matter that the developer is a private, for-profit company. Although county commissions generally may not lease to for-profit organizations, *see* Letter from Att’y Gen. of W. Va. to Larry E. Harrah, II, 2018 WL 3390019 (June 6, 2018), West Virginia Code § 8-19-1 expressly allows a county commission to lease to a private, for-profit party. County commissions may “lease to others for operation ... an electric power system,” W. VA. CODE § 8-19-1, and the tax exemption applies to a county’s lessee, *id.* § 8-19-4. The Code does not contain any relevant qualifiers or restrictions on who the lessee may be, so the county may lease to anyone under the statute, whether non-profit or for-profit. In fact, county commissions have already entered into PILOT agreements with private companies. *See Ohio Valley Jobs All., Inc. v. Pub. Serv. Comm’n of W. Va.*, No. 18-0249, 2018 WL 5734679, at *1, *8 (W. Va. Nov. 1, 2018) (memorandum decision) (recognizing the West Virginia Code authorizes county governments to enter into a PILOT agreement with a private, for-profit corporation); *see also Moundsville Power praises Marshall Co. Commission action*, THE JOURNAL (Aug. 23, 2014), <https://tinyurl.com/3hummy37> (noting that Marshall County approved a PILOT program and lease agreement with a privately-financed natural gas power plant).

* That said, only property “acquired and constructed” for the electric power system qualifies for tax exemption. *See id.* § 8-19-4 (stating that the tax-exempt property is “the real and personal property which a ... county has acquired and constructed according to the provisions of this article”); *id.* § 8-19-1 (clarifying that article pertains to the acquisition and operation of electric power systems). The proposed project here includes a 500-acre industrial park. We cannot say based on the information provided whether that additional property would qualify for the tax exemption.

Based on the facts in your letter, we conclude that the County Commission and the county school board may enter into a PILOT agreement with the developer, provided that the final agreement complies with the statutory terms of West Virginia Code § 8-19-4.

II. The County Commission Has the Authority to Create the Community Fund.

Next, the Commission can set up a special account for the community development fund. West Virginia Code § 7-1-9 says that county commissions are “authorized and empowered to create and establish ... special funds to be used for any purpose” that commissions are “authorized to accomplish.” County commissions “are ... authorized” to fund the special account via tax levies or through “unexpended or surplus moneys in the county general fund.” W. VA. CODE § 7-1-9.

While this provision contains no mandatory language, applying the *expressio unius est exclusio alterius* canon and understanding that commissions have limited authority, it appears county commissions may fund special accounts only in these two ways. See Syl. pt. 1, *State Line Sparkler*, 187 W. Va. 271, 418 S.E.2d 585 (holding that county commissions are “possessed only of such powers as are expressly conferred”); Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) (“In 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.”).

So here, community fund contributions should be deposited into the general fund before being transferred to the special account. And you have explained that the County Commission will only use the money consistent with the Commission’s purpose. Thus, the County Commission has the authority to set up a community development fund with money from the developer and to use the money as the Commission is authorized.

III. The County Commission Should Not Include the Community Fund Provision in the PILOT Agreement.

Finally, the County Commission should not include terms related to the community development fund in the PILOT Agreement itself. Rather, those terms should appear in the related purchase agreement or lease—where the appropriate consideration lies.

Contracts require valuable consideration to be valid and enforceable. Syl. pt. 2, *Young v. Young*, 240 W. Va. 169, 808 S.E.2d 631 (2017) (“No promise is good in law unless there is a legal consideration in return for it.”). “[W]here there is no valuable consideration, and where there is no benefit moving to the promisor or damage or injury to the promisee, [the contract] is void.” Syl. pt. 4, *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012). And “valuable consideration may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.” Syl. pt. 5, *id.*

The PILOT agreement does not contain consideration for the community fund payments. The agreement provides that the fund contributions are “[i]n consideration [for] the transactions contemplated”; that is, the County’s purchase and lease-back of the project property. Yet the

PILOT agreement does not govern those transactions. The PILOT agreement governs only the terms of the PILOT payments. We reach that conclusion for several reasons:

- The agreement is titled: “Payment In Lieu of Taxes Agreement.”
- In the recitals, the developer agrees to make the PILOT payments in exchange for tax-exempt status, which is contingent on the success of the separate transactions.
- Article II governs the “ad valorem property treatment” of the project during the construction phase and during the lease term.
- Article III contains the key terms of the agreement. It concerns the “acquisition and construction of the project and payment in lieu of tax.” It provides that the subject “real and personal property ... is exempt from ad valorem property taxation.” It also provides that when the project is complete, the developer “shall make only the payments in ... lieu of taxes in the amounts, if any, set forth” in an attached schedule.
- The agreement contemplates separate contractual arrangements for the lease and acquisition, which serve as consideration for the community fund payments. Specifically, the recitals refer to a “Lease Agreement,” and section 2.02(a) states that the developer’s leasehold interest will be “created by the Lease.” Section 4.10 provides that the PILOT agreement will become effective only after the developer “acquires the [l]and and title, constructs the [p]roject and transfers ownership in and to the [p]roject to the [l]essor.” Section 4.14(a) makes the developer’s “obligations” under the PILOT agreement “expressly contingent,” on site acquisition “upon terms and conditions acceptable” to the developer. And lastly, section 4.16(a) recognizes that other “property conveyance documents” exist. It sets out certain terms to be reflected in “the [l]ease, and the related prior deed, bill of sale and/or assignments of leases conveying title to the [p]roject to the [l]essor.”

So the community fund provision (but only that provision, because it is severable) will likely be void if it is included in the PILOT agreement. It should be deleted.

A practical reason supports its exclusion as well: the County disburses PILOT payments and community fund contributions differently. West Virginia Code § 8-19-4 plainly states that “payments made ... in lieu of tax pursuant to such an agreement shall be distributed as if the payments resulted from *ad valorem* property taxation.” As noted, the agreement echoes this requirement. In contrast, the County Commission has discretion over how to spend community fund moneys. By mixing the two in one agreement, the Commission risks confusion about which funds are subject to mandatory statutory distribution, and which are discretionary, potentially leading to disbursement or accounting errors.

Ultimately, we recommend addressing the community fund in a separate agreement supported by appropriate consideration. The County Commission should structure these contributions carefully. While special payments beyond standard lease or PILOT amounts serve legitimate public purposes, documenting the consideration behind them helps ensure they align

with established contracting principles. One straightforward approach would be designating a portion of the lease payments for the community development fund.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. McCuskey". The signature is fluid and cursive, with a long horizontal stroke at the end.

John B. McCuskey
West Virginia Attorney General

Holly J. Wilson
Principal Deputy Solicitor General

Spencer J. Davenport
Assistant Solicitor General