



State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

June 18, 2024

The Honorable Gabrielle Mucciola
Monongalia County Prosecuting Attorney
Monongalia County Justice Center
75 High Street
Morgantown, WV 26505

Dear Ms. Mucciola:

You have asked for an Opinion of the Attorney General about a county building commission's power to approve the assignment of a lease. 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 with the Office of the Attorney General.

You explain that the Monongalia County Building Commission has leased property to Sundale Nursing Home since 2019. Sundale operates a long-term care and rehabilitation facility on the property. Although the lease does not expire until 2119, Sundale has experienced recent financial difficulties. Because of these difficulties, Sundale's future viability is at risk. Sundale now has an opportunity to sell its assets—including the lease—to a private, for-profit, nursing home operator. The lease would continue to require the assignee to operate a nursing home on the property, and the property would remain subject to a restrictive covenant requiring the assignee to use the property for certain health-care-related purposes.

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

May the Monongalia County Building Commission agree or consent to the assignment of an existing lease to a private, for-profit entity for the purpose of operating a nursing home, thereby replacing the existing non-profit entity lessee?

We conclude that the Building Commission may lease its property to any party—including a private, for-profit company—so long as the lessee will use the property for a public purpose. And here, operating a nursing home serves a public purpose. Thus, the Building Commission may approve the proposed assignment.

Discussion

I. The Building Commission Has Authority To Approve The Proposed Assignment.

“The powers with which a building commission is ordained are set forth in West Virginia Code § 8-33-4.” *Cnty. Comm’n of Boone Cnty. v. Hill*, 194 W. Va. 481, 486, 460 S.E.2d 727, 732 (1995). That statute lists fifteen express powers. *See* W. VA. CODE § 8-33-4. As to each of them, building commissions “have plenary power and authority.” *Id.* Beyond that, the “legislative grant of power” in this section is “so immense” that other implied powers can be found. *Boone Cnty.*, 194 W. Va. at 486, 460 S.E.2d at 732. And as relevant here, building commissions have plenary power to “[l]ease [their] property or any part thereof, for public purposes, to such persons and upon such terms as the commission deems proper.” W. VA. CODE § 8-33-4(l).

Several aspects of this grant of authority confirm that the Building Commission can approve Sundale to assign its lease to a private, for-profit entity that will use the property to operate a nursing home.

First, the Building Commission may “[l]ease its property ... to such persons ... as the commission deems proper.” W. VA. CODE § 8-33-4(l) (emphasis added). This provision does not constrain the persons to whom the Building Commission can lease its property. The statute is “clear and unambiguous,” *State v. Smith*, 243 W. Va. 470, 475, 844 S.E.2d 711, 716 (2020), and “[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed,” *DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999). It is also improper to “arbitrarily ... read into a statute that which it does not say.” Syl. pt. 5, *Bradford v. W. Va. Solid Waste Mgmt. Bd.*, 246 W. Va. 17, 866 S.E.2d 82 (2021). So if the new lease serves a public purpose, then the Building Commission may lease to “such persons ... as the commission deems proper,” full stop. W. VA. CODE § 8-33-4(l). Because the lease contains no exclusionary terms, this “[p]lain statutory language” includes the ability to lease to private, for-profit entities and “does not need to be construed” beyond face value. Syl. pt. 2, *Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 460, 745 S.E.2d 493, 498 (2013).

Second, to lease property (or approve an assignment of a lease), the Building Commission must show that a lease is “for public purposes.” W. VA. CODE § 8-33-4(l). Section 8-33-4 does not define “public purpose.” Nor has the Supreme Court of Appeals defined the term for that section. But in other contexts, the Court has explained that “[w]hat constitutes a public purpose varies” is based on “societal needs and demands.” *State ex rel. W. Va. Citizens Action Grp. v. W. Va. Econ. Dev. Grant Comm.*, 213 W. Va. 255, 278, 580 S.E.2d 869, 892 (2003); *see also, e.g., id.* at 277-80, 580 S.E.2d at 891-94 (describing the broad conception of “public purpose” under modern authorities). We must consider whether the “primary and dominant purpose” of a proposed undertaking is to confer public benefits. *State ex rel. City of Charleston v. Coghill*, 156 W. Va. 877, 884, 207 S.E.2d 113, 118 (1973). If it is, then the presence of “private ancillary benefits” will

not change the undertaking to a private purpose. *Id.* Thus, a property can still serve a public purpose even when a for-profit entity is involved. *See, e.g., State ex rel. Ohio Cnty. Comm'n v. Samol*, 165 W. Va. 714, 717, 275 S.E.2d 2, 4 (1980) (holding that issuance of bonds to develop shopping center served a public purpose); *Coghill*, 156 W. Va. at 883, 207 S.E.2d at 118 (finding that parking garages served a public purpose even when leased by a private, for-profit entity); *Greene Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901, 905 (1940) (finding that a property on which a wharf was being operated was being put to a public use, even though it was leased to a for-profit enterprise that must pay taxes on the separate leasehold interest).

Operating a nursing home should qualify as a public purpose. The Legislature has declared that “[i]t is the policy of this state to encourage, promote, and require the maintenance of nursing homes.” W. VA. CODE § 16B-4-1. And a “legislative determination of what is a public purpose will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest.” *State ex rel. Cnty. Ct. of Marion Cnty. v. Demus*, 148 W. Va. 398, 406-07 135 S.E.2d 352, 358 (1964). We doubt that the “judicial mind” would question this interest, as the Supreme Court of Appeals has already recognized that a public purpose is served in providing “residential housing” to the elderly considering the “shortages” of “nursing homes and intermediate care facilities” in West Virginia. *State ex rel. W. Va. Hous. Dev. Fund v. Waterhouse*, 158 W. Va. 196, 215-16, 212 S.E.2d 724, 735 (1974). Nothing has changed since then; as one of the country’s most elderly States, West Virginia continues to face challenges in providing adequate long-term care. *See, e.g., Paige Taylor, West Virginia Nursing Homes Remain Stable Amid Staff Shortages, Rising Costs*, WCHS (Oct. 3, 2023, 8:56 AM), <https://bit.ly/3KB2MZb>. And authorities from elsewhere confirm that securing nursing-home care advances a public purpose, too. *See, e.g., Lycoming Cnty. Nursing Home Ass’n v. Commonwealth*, 627 A.2d 238, 243 (Pa. Commw. Ct. 1993) (holding that construction of nursing home was “intended to further a public purpose”); *State v. Leon Cnty.*, 400 So. 2d 949, 951 (Fla. 1981) (holding that funding of a for-profit nursing home served a public purpose); *Stovall v. E. Baptist Inst.*, 375 S.W.2d 273, 275 (Ky. 1964) (holding that it served a public purpose to encourage the provision of “suitable housing and care facilities for elderly persons,” despite private benefits that might flow from the law).

Thus, the continued operation of an otherwise potentially failing nursing home—as here—should be considered a public purpose.

Third, and finally, Section 8-33-4’s broader context confirms that the Building Commission should have the power to approve the assignment here. The Commission’s power is “plenary.” W. VA. CODE § 8-33-4. “[P]lenary” means “[f]ull, entire, complete, absolute, perfect, unqualified.” *Gastar Expl. Inc. v. Rine*, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017). And “plenary power” is “as broad as is required in a given case.” *Ellison v. City of Parkersburg*, 168 W. Va. 468, 472, 284 S.E.2d 903, 906 (1981). Thus, the Building Commission’s “plenary” powers must be “broadly construed.” *Power*, BLACK’S LAW DICTIONARY (11th ed. 2019). Beyond that, under West Virginia Code § 8-33-12, all provisions of Article 33—Section 8-33-4(l) included—are to “be liberally construed.” So if there were any doubts about the Commission’s ability to act here, those doubts would need to be resolved in favor of the Commission.

Altogether, the statute confirms that the Building Commission may approve an assignment of its lease to a private, for-profit entity to operate a nursing home.

II. Our Previously Issued Opinion Does Not Change The Analysis.

A previously issued opinion from the Attorney General, referenced in your request, does not change the analysis. *See* W. Va. Op. Att’y Gen., 2018 WL 3390019 (June 6, 2018) (“2018 Opinion”). The opinion is distinguishable in at least two important ways.

For one, our prior opinion concerned a *county commission’s* authority. 2018 Opinion at 1. County commissions have more circumscribed authority to lease property: they may lease only (1) to “nonprofit organizations” for certain enumerated purposes and (2) to the federal government, “the state or agency or instrumentality thereof” for “a public purpose.” *See* W. VA. CODE § 7-1-3k, 7-1-3hh. A county commission also cannot assert implied authority that is broader than its express authority. Syl. pt. 4, *State ex rel. W. Va. Parkways Auth. v. Barr*, 228 W. Va. 27, 716 S.E.2d 689 (2011). And on top of that, “[i]f any reasonable doubt exists as to whether” a county commission “has a power, the power must be denied.” Syl. pt. 1, *McAllister v. Nelson*, 186 W. Va. 131, 411 S.E.2d 456 (1991).

As we have already described, a building commission’s authority is broader than a county commission’s power. The Legislature did *not* limit a building commission to leasing property to non-profit and governmental entities. And unlike the presumption that attaches to a county commission’s powers, courts should err on the side of *granting* a building commission any power that can be reasonably grounded in the statute. So the Building Commission’s involvement changes the analysis.

For another, our prior opinion addressed a situation that would plainly *not* serve a public purpose: leasing to an enterprise that would run a paid “escape room” attraction. 2018 Opinion at 1. The agreement would have only offered “ancillary” public benefits “in the form of a partial revenue-sharing agreement.” *Id.* at 3. It would not have “alleviate[d] social problems.” *W. Va. Citizens Action Grp.*, 213 W. Va. at 278, 580 S.E.2d at 892; *see also* 51 W. Va. Op. Att’y Gen. 759, 1966 WL 87473 (Apr. 4, 1966) (“1966 Opinion”) (“[I]f the purpose be restricted so as to benefit but a few or its primary object is to aid the private needs and uses of people, the purpose is not a ‘public purpose.’”). But the opinion also made plain that it did not turn on the involvement of a for-profit enterprise. 2018 Opinion at 4 (“[T]hat is not to say that any proposed lease ... would be impermissible ... simply because the intended purpose requires involvement of a private company.”); *accord* 1966 Opinion at 7 (“[T]he test is in the end, not in the means.” (quoting *Hager v. Ky. Child. ’s Home Soc.*, 83 S.W. 605, 608 (Ky. 1904))).

Here again, we have already described why the nursing-home facility here serves a different—and public—purpose from a private “escape room.” A property serves a public purpose where its use “promot[es] and protect[s] *health*, morals, safety, and the *public welfare*.” *Coghill*, 156 W. Va. at 882, 207 S.E.2d at 117 (emphasis added). Unlike a gaming facility, providing a place for the eldest among us to receive care goes directly to the State’s health and public welfare. Indeed, the facts recited in your letter and the accompanying materials suggest that Sundale has been serving the public for decades—and will continue to do so through assignment of the lease.

For all these reasons, the Monongalia County Building Commission may allow Sundale to assign its lease to for-profit nursing home operator for the continued operation of a nursing home.

Sincerely,



Patrick Morrissey
West Virginia Attorney General

Michael R. Williams
Solicitor General

Caleb A. Seckman
Assistant Solicitor General