



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

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

September 24, 2024

The Honorable D. Luke Furbee
Tyler County Prosecuting Attorney
P.O. Box 125
Middlebourne, WV 26149

Dear Prosecutor Furbee:

You have asked for an Opinion of the Attorney General about the entities that may own property that a local health department uses. This Opinion is being issued under West Virginia Code Section 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 Wetzel County and Tyler County have a joint health department overseen by a combined local board of health for the two counties. The health department is housed in leased property that no longer adequately serves its needs. Thus, the combined local board of health seeks to acquire new property and construct a new facility for the health department.

You raise the following legal questions:

- (1) *May a combined local board of health acquire and hold title to real property?*
- (2) *If a combined local board of health cannot own real property, must a county commission own it?*
- (3) *If the Wetzel County and Tyler County Commissions jointly invest in property for the health department’s use, may the commissions own the property together, regardless of the property’s location?*

We conclude that a local board of health may acquire property and construct public health facilities on it. Thus, the county commission is not required to purchase the property. Still, should they decide to do so, the Wetzel County and Tyler County Commissions have the power to purchase property for the department's use.

DISCUSSION

I. The Wetzel-Tyler Local Board Of Health May Acquire Property And Construct Public-Health Facilities.

West Virginia Code § 16-2-11 describes the powers and duties of local boards of health. It applies to “all local boards of health,” *id.* § 16-2-1, including “[c]ombined local board[s] of health,” *id.* § 16-2-2, like the Wetzel-Tyler local board of health. *See also id.* (defining “local board of health” to include “a board of health serving one or more counties or one or more municipalities or a combination thereof”). And where a local board of health is acting within its enumerated powers and duties, courts will “not ordinarily interfere” unless there is a “clear showing of fraud, collusion or palpable abuse of discretion.” *Bane v. Bd. of Educ. of Monongalia Cnty.*, 178 W. Va. 749, 755, 364 S.E.2d 540, 546 (1987).

Among their duties, local boards of health “shall ... [p]rovide equipment and *facilities* for the local health department.” W. VA. CODE § 16-2-11(a)(2) (emphasis added). This power isn't a discretionary one, either; by using the word “shall,” the statute requires the local board of health to provide facilities for the health department. *See State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) (“[S]hall’ commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.”). To execute this duty, local boards of health can use any “money or property” they receive for the “establishment or construction of public health facilities.” W. VA. CODE § 16-2-11(b)(4).

The statute's authorization to provide, establish, and construct facilities likely expressly allows the board to acquire property. For instance, although the Supreme Court of Appeals has never been asked to define “provide” in this context, at least one other court has held that “[t]he power to provide includes the power to purchase.” *Dancy v. Davidson*, 183 S.W.2d 195, 198 (Tex. Civ. App. 1944). Similarly, the West Virginia Code does not define “construct,” but other state legislatures using it in similar provisions have said it “means all activities necessary or incidental” to construction, “including ... acquisition of property or any interest therein.” CAL. GOV'T CODE § 54700.4; *see also United States v. Threlkeld*, 72 F.2d 464, 466 (10th Cir. 1934) (“[T]he broad authority to construct [roads] ... includes the power to acquire land for that purpose.”). We see the same pattern with “establish.” *See, e.g.,* S.C. CODE § 4-23-1220(16) (defining “construct and establish” to “include[] the cost ... of all land [and] property”). Nothing about West Virginia law leads us to conclude that the result would be any different here.

But even if the power to provide, establish, and construct did not cover purchasing property, those powers necessarily imply authority to purchase property. Indeed, “every power necessary to the execution of an express power is plainly implied.” *State ex rel. Post v. Bd. of Educ. of Clarksburg Sch. Dist.*, 71 W. Va. 52, 54, 76 S.E. 127, 128 (1912). And it would be nearly impossible for a local board of health to provide, establish, or construct a facility if it could not

own property to do so. Thus, “[t]he implied power to acquire the ground is as plainly given as the express power to erect the buildings.” *Id.*; see also *Herald v. Bd. of Educ.*, 65 W. Va. 765, 771, 65 S.E. 102, 105 (1909) (recognizing that a governmental entity could “secure property” for a “public purpose” where, among other things, “the power ... is necessarily implied as essential to ... the carrying on of the particular governmental object for which [the entity] was organized”).

Thus, we conclude the Wetzel-Tyler local board of health has the authority to acquire real property and to construct a new public health facility for the Wetzel-Tyler Health Department.

II. Ownership By A County Commission Is Not Required.

Because the Wetzel-Tyler local board of health may own real property, your second question is effectively moot. A county commission need not own the property for the health department’s use.

III. The Wetzel County And Tyler County Commissions May Jointly Own Property Within Either Of Their Counties.

Though ownership by a county commission is not required, we still address your question about whether county commissions can jointly own property located in one county. This question touches on three separate issues: (1) a county commission’s powers to acquire property for a local board of health; (2) whether two county commissions may jointly own that property; and (3) where such property may be located. We address each issue in turn.

First, county commissions are “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). And when a county commission is acting according to its expressly granted authority, it enjoys “wide discretion.” *Cnty. Comm’n of Greenbrier Cnty. v. Cummings*, 228 W. Va. 464, 469, 720 S.E.2d 587, 592 (2011). So broad grants of express power naturally come with broad grants of implied power. See, e.g., syl. pt. 1, *Teach*, 187 W. Va. 271, 418 S.E.2d 585 (finding that the “grant of the police power” implies “the power to punish by a pecuniary fine or penalty”).

The county commissions’ express powers include the ability to purchase property or build facilities like you describe. County commissions “may, by purchase or otherwise, acquire as much land as may be requisite or desirable for county purposes.” W. VA. CODE § 7-3-2. And they may “suitably enclose, improve and embellish the lands so acquired.” *Id.* Similarly, county commissions may “acquire” and “convey real estate” through “a contract, or lease, or with any bank or financial institution, or with any individual or persons for the erection, construction, equipment, leasing and renting of ... public buildings.” *Id.* § 7-3-5. County commissions are also “authorized and empowered to acquire real estate for, construct, equip, furnish and maintain” any “public buildings.” *Id.* § 7-3-7.

County commissions’ powers to acquire and improve property must be “liberally construed,” making them even broader than they already appear. W. VA. CODE § 7-3-12. Put it all together and—in the words of the Supreme Court of Appeals—county commissions have

“discretion ... without limitation” in purchasing and improving property. *Keatley v. Summers Cnty. Ct.*, 70 W. Va. 267, 270, 73 S.E. 706, 708 (1911). Given that, their express powers almost surely encompass the right to purchase property for a local health board’s benefit. See W. VA. CODE § 16-2-14 (granting county commissions the power to “appropriate and spend money ... for public health purposes and to pay the expenses of the operation of the local board of health services and facilities”).

But even without these express real estate powers, we conclude that the county commissions’ implied powers would entail the ability to buy property and build facilities for the health department. The Legislature tasked county commissions with “creat[ing], establish[ing] and maintain[ing] a county board of health.” W. VA. CODE § 16-2-3. To achieve that directive, county commissions may take actions that are “reasonably necessary to perform that function.” *State ex rel Cnty. Ct. v. Arthur*, 150 W. Va. 293, 297, 145 S.E.2d 34, 37 (1965). Creating, establishing, and maintaining a county board of health requires a building to put them in. Additionally, West Virginia Code § 16-2-14 requires county commissions to “provide financial support for the operation of the local health department.” Altogether, the “symbiosis” between county commissions and local health departments—including an explicit “financial tether”—implies that a county commission would be authorized to buy property or build facilities for a health department. *State ex rel. Warner v. Jefferson Cnty. Comm’n*, 198 W. Va. 667, 673, 482 S.E.2d 652, 658 (1996); see also *id.* (“We can reach no other conclusion than that as a matter of law the Jefferson County Commission has a duty and responsibility of financially subsidizing the functions of the [Jefferson County Solid Waste Authority] if for no other reason than the interrelationship between these two public agencies dedicated to a common goal of collecting and disposing of the county’s solid waste.”).

Second, county commissions may exercise any powers they possess jointly with another county commission. This power is described several times throughout the West Virginia Code. For instance, West Virginia Code § 7-1-3i says that “[a]ny county commission may join together in the exercise of any of its powers ... with any other county or counties ... in carrying out any lawful purpose not in conflict” with West Virginia’s constitution. Similarly, West Virginia Code § 8-23-3 empowers county commissions to exercise “any power or powers ... jointly with any other public agency which could likewise act alone.” And as to joint property ownership, West Virginia Code § 8-23-3 contemplates that county commissions may “acquir[e], hold[] and dispos[e] of real and personal property” to be “used in [a] joint or cooperative undertaking.”

These statutes are clear and so should be read “according to [their] unvarnished meaning.” Syl. pt. 3, *W. Va. Health Care Cost Rev. Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996). Their plain texts empower county commissions to jointly operate in any manner a county commission could by itself—including acquiring property and constructing facilities. See *Wheeling Park Comm’n v. Dattoli*, 237 W. Va. 275, 282, 787 S.E.2d 546, 553 (2016) (“[A] statute that is clear and unambiguous will be applied and not construed.”). Thus, the Wetzel County and Tyler County Commissions may jointly purchase, hold, and improve property for the benefit of their combined health department.

Third, we understand your question about the property’s location to be asking whether ownership may be shared if the property is within either Wetzel County or Tyler County. Because

county commissions have the power to acquire real estate within their county, that power—like any of their other powers—can be jointly exercised with another county commission. *See* W. VA. CODE §§ 7-1-3i, 8-23-3. And we are not aware of any limitation on the commissions' powers of ownership that would apply in circumstances like these. As a result, the Wetzel County and Tyler County Commissions may share ownership of property for their combined health department within either of their respective counties.

Finally, if the Wetzel County and Tyler County Commissions enter into an intergovernmental agreement to purchase property or construct facilities, any such agreement would require an “[a]ppropriate action by ordinance, resolution or otherwise pursuant to [the] law of the governing bodies of the participating public agencies.” W. VA. CODE § 8-23-3. And if a new legal entity results from the intergovernmental agreement, the agreement must follow statutory requirements, such as specifying its purpose, duration, and the entity's composition. *Id.* §§ 8-23-3 to -4.

Sincerely,



Patrick Morrisey
West Virginia Attorney General

Michael R. Williams
Solicitor General

Caleb A. Seckman
Assistant Solicitor General