



State of West Virginia  
Office of the Attorney General

John B. McCuskey  
Attorney General

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

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The Honorable Kristina D. Raynes  
Putnam County Prosecuting Attorney  
Putnam County Prosecuting Attorney's Office  
12093 Winfield Rd., Suite 2  
Winfield, WV 25213

Dear Prosecutor Raynes:

Your office has asked for an Opinion of the Attorney General about whether the Putnam County Commission may exercise the power of eminent domain to acquire two sections of property bordering land owned by the County Commission, which it is currently leasing to a gun club. 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 Putnam County Commission was deeded a 100-acre tract of land with the condition that it must use the land for "public recreation and other public purposes." Currently, the County Commission leases the land to the Putnam County Gun Club. The Putnam County Gun Club is required to be of public use because it was built with a Land and Water Conservation Fund Grant. You explain that the Putnam County Gun Club meets this requirement by offering membership to anyone in the public, hosting gun safety training classes to members and nonmembers, and serving as a location for training and qualification for local law-enforcement, the military, U.S. Immigration & Customs Enforcement, and the State Police. The West Virginia Department of Economic Development periodically checks the property to verify that the property has continued to be used for public purposes.

You further explain that a property owner with land adjoining the Gun Club has reportedly found bullets on two separate areas of his property. The property owner has said that a lead abatement company will remove the lead from his property at a cost to the taxpayers of Putnam County of approximately two-million dollars. Hoping to avoid the expensive lead abatement

process and mitigate any public safety concerns, the Putnam County Commission wants to acquire the two portions of the property belonging to the property owner.

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

*May the County Commission exercise the power of eminent domain to acquire two portions of private property near a gun club that it believes poses a public safety issue?*

We conclude that, under the facts you have described, the County Commission may likely exercise its power of eminent domain to acquire the two portions of property. The State—and its political subdivisions—may take private property provided the State takes the property for a “public” use and provides “just” compensation for the property. Based on your letter, the County Commission would be taking the land to allow for the safe and economical running of the Gun Club, which would qualify as a public use. So the County Commission may constitutionally take the land provided it (1) is not doing so in bad faith or arbitrarily and capriciously; and (2) gives just compensation to the property owner.

### ***Discussion***

Eminent domain is the power of the State to take or damage private property for a public purpose upon payment of just compensation. The right of the State to take private property for public purposes “is an inherent attribute of sovereignty, irrespective of any constitutional or statutory provision.” *State by State Rd. Comm’n v. Pro. Realty Co.*, 144 W. Va. 652, 657, 110 S.E.2d 616, 620 (1959). The West Virginia Legislature has clarified that “every corporate body politic” in the State has the “right of eminent domain,” W. VA. CODE § 54-1-1, which includes counties. *See Gomez v. Kanawha Cnty. Comm’n*, 237 W. Va. 451, 459 n.15, 787 S.E.2d 904, 912 n.15 (2016). So the County Commission has eminent domain power.

The West Virginia Constitution limits the State’s eminent domain power to the taking or damaging of private property for “public use.” W. VA. CONST. art. III, § 9. The Constitution provides that any taking requires “just compensation,” which will be “ascertained by an impartial jury of twelve freeholders.” *Id.* The West Virginia Legislature has since established a procedure for determining just compensation called condemnation. *See* W. VA. CODE §§ 54-2-1 to -21.

#### **I. The Condemnation Process.**

Before beginning the condemnation process, we recommend that the County Commission enter good-faith negotiations with the property owner to purchase the land it wishes to condemn. West Virginia law requires a “condemnor” (the County Commission) to enter good-faith negotiations with the property owner before initiating condemnation proceeding under “slum and blight.” W. VA. CODE § 54-1-2a. Although your letter does not indicate “slum and blight,” “theories supporting the use of eminent domain for the removal of blight can be applied to the taking of private contaminated property.” Colin M. McNiece, *A Public Use for the Dirty Side of Economic Development: Finding Common Ground Between Kelo and Hathcock for Collateral Takings in Brownfield Redevelopment*, 12 ROGER WILLIAMS UNIV. L. REV. 229, 231 (2006). And

negotiating before condemnation is consistent with the Legislature's goal "to encourage and expedite the acquisition of real property," "avoid litigation and relieve congestion in the courts," "assure consistent treatment of persons," and "promote public confidence in the land acquisition practices of any state agency." W. VA. CODE § 54-3-2; *see also* 2 PATRICIA E. SALKIN, AM. LAW. ZONING § 17:21 (5th ed. 2025).

If negotiations fail, then the County Commission may start the eminent domain action. The County Commission files the condemnation petition in the circuit court where the property is located. W. VA. CODE § 54-2-1. The circuit court must then determine whether "the applicant has a lawful right to take property for the purposes stated in the condemnation petition." *Gomez*, 237 W. Va. at 459-60, 787 S.E.2d at 912-13. An applicant may lawfully take property if the "applicant's expressed use of the property is, in fact, a public one, and the condemnation is not impelled by bad faith or arbitrary and capricious motives." *Id.*

Once the circuit court has determined the property can be taken, the circuit court appoints five commissioners—"disinterested freeholders"—to determine the amount of just compensation and any damages. W. VA. CODE § 54-2-5. The commissioners then file a report with the circuit court, *id.* § 54-2-9, and the County Commission may pay the amount if no party objects. But any party may object to the condemnation report within ten days after the report is filed, in which case a jury trial will determine the amount owed. *Id.* § 54-2-10; W. VA. CONST. art. III, § 9.

In any challenge to a condemnation proceeding, courts look at two factors when determining whether a property may lawfully be taken. First, the court considers whether the government's expressed use of the property is a public one. *Gomez*, 237 W. Va. at 459-60, 787 S.E.2d at 912-13. Second, the court looks at whether the government's action to take property was "impelled by bad faith or arbitrary and capricious motives." *Id.*

## **II. The County Commission May Likely Use Its Eminent Domain Power Here.**

Applying the factors above, and based on the information in your letter, we conclude that the County Commission can likely take the property because it would be doing so for a public purpose. We cannot definitively say, however, whether the taking would be impelled by bad faith.

### *a. The County Commission would be taking the property for a public use.*

In West Virginia, public use is broadly defined to encompass any project that the "public" has "some direct and certain right, or interest in it, or control over it." *Gomez*, 237 W. Va. at 460, 787 S.E.2d at 913. So "[w]hether a use is public or private is to be determined by the character of such use, and not by the number of persons who enjoy it, or avail themselves of it." *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co.*, 57 S.E. 401, 62 W.Va. 185 (1907).

The West Virginia Legislature has enumerated several examples of public uses for which private property may be taken, including for railroads, schools, and cemeteries. W. VA. CODE § 54-1-2. But the Legislature expressly authorized eminent domain for "*any and every* other public use." *Id.* (emphasis added). So as the West Virginia Supreme Court of Appeals has recognized, "agencies of the state are clothed with wide discretion in determining purposes for which right of

eminent domain may be invoked, and amount of property needful and reasonably necessary for a particular project.” Syl., *State v. Horner*, 1 S.E.2d 486, 121 W. Va. 75 (1939). For example, the Supreme Court of Appeals found that a county commission could lawfully take property that was to be used for depositing removed material for an airport renovation. *Gomez*, 237 W. Va. at 459-60, 787 S.E.2d at 912-13. The Supreme Court of Appeals found that the taking was constitutional because it had “a direct and certain effect on the public: the improvement, maintenance, and operation of a publicly-owned airport.” *Id.*

Based on the facts in your letter, the County Commission would be taking the two parcels of land for a public use. You explain that the Gun Club poses potential public safety issues for anyone standing or traveling in those sections because bullets were found there. Improving public safety benefits the public. See *Peters Twp. v. Snyder*, 305 A.3d 228, 236-37 (Pa. Commw. Ct. 2023) (finding that a condemnation to provide a connecting road to an existing development was for a public use because its purpose was to provide “improved access”). And the lead bullets themselves pose a safety issue due to the risk of lead contamination. See McNiece, *supra*, at 231. The Commission’s condemnation likely transfers any lead abatement duty to the County, and the Commission may be more able than a private landowner to carry out any abatement obligations.\*

The Commission would also be furthering the public use of the Gun Club because the costly lead abatement process would likely endanger the Gun Club’s existence. Simply, the costs to maintain the gun range would be too high. And as you explain, the Gun Club already serves the public by hosting gun safety training classes and serving as a training and qualification facility for local law enforcement, military organizations, and the WV State Police. So acquiring the land would advance a public use by allowing the Gun Club to continue operating and serving this important function.

Our analysis does not change even though the County Commission has long-term leased the property to the Gun Club. The West Virginia Code says that private property cannot be taken “when the primary purpose of the taking is *economic development* that will ultimately result in ownership or control of the property transferring to another private entity, other than one having the power of eminent domain, whether by purchase agreement, long-term lease agreement or any other mechanism whereby ownership or control is effectively transferred.” W. VA. CODE § 54-1-2 (emphasis added). Although the County Commission would presumably lease the taken property to the Gun Club, the primary purpose of the taking would *not* be for economic development. Rather, it would be for public safety and saving the County money.

Your letter suggests that the County Commission would be taking the property for a public use and is constitutionally permissible.

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\* Although your letter does not raise this issue, we note that condemnation may create additional liabilities for the County. See, e.g., Richard Herold & Patrick Paul, *Eminent Domain: Be Careful What You Ask For*, SNELL & WILMER (Feb. 05, 2016), <https://tinyurl.com/3tkvnday>; EPA, *State and Local Government Activities and Liability Protections*, <https://tinyurl.com/3kp4pshr> (last updated Apr. 30, 2025). If it has not already done so, the County may wish to consult with an appropriate environmental attorney to ensure that it understands the scope of these potential obligations.

b. *Nothing in your letter indicates that the County Commission would be taking the property in bad faith.*

Once the County Commission shows a “public use,” the only way its right to take property can be overcome is if the property owner can show “egregious bad faith in the taking” or “arbitrary and capricious motives.” *State ex rel. W. Va. Dep’t of Transp. v. Tucker*, 241 W. Va. 307, 310-11, 824 S.E.2d 534, 537-38 (2019).

“In the absence of egregious bad faith, if the use is a public one, the necessity for the designated property is not open to judicial review.” *Gomez*, 237 W. Va. at 460, 787 S.E.2d at 913. Bad faith generally implies the doing of an act for a dishonest purpose. The term “contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will.” *Lustrelon Inc. v. Prutscher*, 428 A.2d 518, 526 (N.J. App. Div. 1981). So although the public purpose for taking land may be valid, the condemnation may be set aside if the real reason is beyond the power conferred by law. *Borough of Essex Fells v. Kessler Inst. for Rehab., Inc.*, 673 A.2d 856, 861 (N.J. Law. Div. 1995).

Courts may also set aside a condemnation if the motive is considered “arbitrary or capricious.” *Tucker*, 241 W. Va. at 310-11, 824 S.E.2d at 537-38. In the condemnation context, arbitrary and capricious means “willful and unreasoning action, action without consideration and in disregard of the facts and circumstances.” *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 269 (Tex. App. 2005). Arbitrary or capricious does not mean, however, that the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public. *Tucker*, 241 W. Va. at 310-11, 824 S.E.2d at 537-38.

Nothing in your letter suggests that the County Commission would be using its condemnation power in bad faith or arbitrarily and capriciously. Protecting public safety and saving the County money are both legitimate interests, and it appears that the County Commission has acted reasonably considering the facts and circumstances. Additionally, it appears that the County Commission only intends to acquire portions of land where bullets were located, which is consistent with the West Virginia Legislature’s instruction that “[t]he land acquired by condemnation ... for any [] public use ... shall be limited to such quantity as is necessary for the purpose or purposes for which it is appropriated.” W. VA. CODE § 54-1-6. Limiting condemnation only to the land necessary for the County’s stated public use suggests a lack of bad faith or arbitrary and capricious taking.

So at least based on the facts in your letter, we find it unlikely that the landowner carries his burden to show bad faith or arbitrary and capricious motives. Even so, the County Commission could reduce the chance a court finds bad faith by thoroughly explaining in its condemnation petition how it determined that condemnation was the appropriate action and only seeking to condemn the land that it needs to serve its public use.

***Conclusion***

The Putnam County Commission may likely use its eminent domain power to acquire the two areas of property provided that the Commission follows the proper procedures.

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  
Attorney General

Caleb B. David  
Deputy Solicitor General

Spencer J. Davenport  
Assistant Solicitor General