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June 6, 2018

Larry E. Harrah, II
Fayette County Prosecuting Attorney
108 East Maple Avenue
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Dear Prosecutor Harrah:

You have asked for an Opinion of the Attorney General concerning the authority of a county commission to lease real property with the understanding that the land will be used to operate a for-profit business. This Opinion is being issued pursuant to W. Va. 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.” To the extent this Opinion relies on facts, it is based upon the factual assertions provided in your correspondence with the Office of the Attorney General.

You explain that the Fayetteville Convention and Visitors Bureau (“Fayetteville CVB”) previously leased county-owned property from the Fayette County Commission (“Commission”), and that the property has historically been used as a jail and law enforcement museum. The Fayetteville CVB would like to renew the lease as either a joint lessee with Epic Pories (“Epic”), the owner of the for-profit company Epic Escape Game New River Gorge, or as the sole lessee, but with an intent to form a “partnership agreement” or sublease with Epic. Under either arrangement, Epic would operate a for-profit escape room game facility at the site. In exchange for access to and management of the property, Epic would pay the Fayetteville CVB a percentage of the fees it charges each participant.

Your letter raises the following legal question:

Whether a county commission has authority to lease county-owned property to a governmental entity and a for-profit business as joint lessees, or to the governmental entity alone where it intends to enter into a subletting or similar arrangement designed to allow the company to operate a for-profit enterprise on the property?

We conclude that, under the facts you have described, neither type of lease would be permissible under West Virginia Code Sections 7-1-3hh and 7-1-3k.

Discussion

A county commission is “possessed only of such powers as are expressly conferred by the Constitution and the legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given.” Syl. Pt. 4, *State ex rel. W. Va. Parkways Auth. v. Barr*, 228 W. Va. 27, 716 S.E.2d 689 (2011); *see generally* W. Va. Const., art. 9, § 11 (“Powers of county commissions”). With respect to lease agreements, a county commission’s express authority flows from two statutory provisions. *First*, it may lease “county-owned buildings, lands, and other properties” to “nonprofit organizations” for certain enumerated purposes. W. Va. Code § 7-1-3k. *Second*, a county commission may lease “any of its real or personal property” to the federal government or “to the state or any agency or instrumentality thereof,” provided that the lease is “for a public purpose.” *Id.* § 7-1-3hh.

A county commission’s implied authority to lease property is similarly constrained. “Implied authority” is that which is “reasonably and necessarily implied in the full and proper exercise of” the commission’s express powers. Syl. Pt. 4, *Barr*, 228 W. Va. 27, 716 S.E.2d 689. Notably, a commission’s implied power to lease its property may not exceed its express authority. *Id.*; Syl. Pt. 1, *State ex rel. State Line Sparkler of W. Va., Ltd. v. Teach*, 187 W. Va. 271, 418 S.E.2d 585 (1992). Thus, while a county commission may exercise substantial implied authority in contexts where it possesses broad express powers, *see, e.g., State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 283, 507 S.E.2d 376, 384 (1998) (implied authority to employ security personnel at county judicial facility), here the narrow scope of the commission’s express powers constrains its implied authority as well.

Finally, any ambiguity about the scope of the powers granted to a county commission must be resolved *against* finding the existence of such authority. *See* Syl. Pt. 1, *McCallister v. Nelson*, 186 W. Va. 131, 411 S.E.2d 456 (1992).

Applying these principles, we first conclude that the Commission may not lease county property to Epic, even as a joint lessee with the Fayetteville CVB. The Commission has express authority to enter into leases with non-profit organizations for certain purposes or governmental entities for a “public purpose.” W. Va. Code §§ 7-1-3k, 7-1-3hh. Because Epic is a private, for-profit business, any lease including Epic as a party would exceed these limits. Similarly, power to lease property to a private company for economic gain is neither “reasonably” nor “necessarily” implied in the exercise of the Commission’s express powers.

We reach the same conclusion where the Fayetteville CVB is the sole lessee, but the purpose of the lease is to facilitate a sublease or other arrangement that would permit Epic to operate the property as a for-profit escape room facility. We assume in this Opinion that the Fayetteville CVB is an “instrumentality” of the State for purposes of Section 7-1-3hh. *See* 61 W. Va. Op. Atty. Gen. 72, 1986 WL 288932, at *2-3 (Feb. 3, 1986) (concluding that the Charleston Convention Bureau is an instrumentality of the City of Charleston). This means that the Commission may lease county property to the Fayetteville CVB provided that the lease serves a “public purpose.” W. Va. Code § 7-1-3hh. Unlike the Commission’s previous lease with the Fayetteville CVB, however—where the property was used as an historic jail and law enforcement museum—a lease designed to allow a private company to conduct for-profit business activities does not satisfy the public purpose test. Thus, the fact that the Fayetteville CVB would be the sole signatory would not bring the arrangement proposed here within the scope of Section 7-1-3hh.

This Office addressed a similar question in a 2014 Opinion of the Attorney General, and concluded that a county commission could not lease or rent the third floor of a county-owned building to a private individual for use as a private residence. 2014 WL 1875639 (May 6, 2014). In that Opinion, we explained that the term “public purpose” is not defined in the statute, and the Supreme Court of Appeals has not addressed the meaning of the term for purposes of Section 7-1-3hh. Nevertheless, our Supreme Court has addressed the concept in other contexts. *See State ex rel. City of Charleston v. Coghill*, 156 W. Va. 877, 882, 207 S.E.2d 113, 117 (1973) (holding that a government entity does not act for a public purpose where its action has “as its primary and dominant purpose the conferring of private benefits, with only ancillary public benefits”); *State ex rel. West Virginia Citizens Action Grp. v. West Virginia Econ. Dev. Grant Comm.*, 213 W. Va. 255, 278, 580 S.E.2d 869, 892 (2003) (explaining that “public purpose” is not a static definition but instead changes based upon societal needs).

In *Coghill*, the Court analyzed the term “public purpose” as used in West Virginia Code § 8-16-4a(a) in connection with a statutory provision that permitted the City of Charleston to sell a limited number of parking spaces in a public parking garage to private individuals. 156 W. Va. at 878-84, 207 S.E.2d at 114-18. The Court held that such sales were permissible, explaining that “a parking facility designed for an acknowledged public purpose is constitutional, even though it confers ancillary and incidental benefits upon private persons.” *Id.* at 884, 207 S.E.2d at 118. By contrast, a proposed use would be impermissible where the “private benefits to the private business occupants are so overwhelming, compared with the public benefits, that the nature of the government’s project changes from a public purpose with private ancillary benefits to a private purpose with public ancillary benefits.” *Id.* The critical question is thus whether the “*primary and dominant purpose*” of a proposed use of government land is to confer public benefits. *Id.* (emphasis added).

Consistent with *Coghill* and the analysis in our 2014 Opinion, we conclude that a lease with the Fayetteville CVB that would allow Epic to operate a for-profit business on county land would likely not satisfy the “public purpose” requirement in Section 7-1-3hh. Although the proposed agreement would require Epic to share an unspecified portion of revenues with the Fayetteville CVB, it appears that the majority of revenue would revert to Epic. In *Coghill*, the sale

of a small percentage of parking spaces could be used to offset costs of the project's primary, public aim: building and operating a public parking structure. Here, the dominant purpose appears to be Epic's business interests, with only ancillary benefits flowing back to the public in the form of a partial revenue-sharing arrangement.

While economic factors "are not the sole criteria for determining whether commercial sale or leasing are necessary and ancillary to [a] public purpose," *Coghill*, 156 W. Va. at 884, 207 S.E.2d at 118, there appear to be no additional factors here that would shift the calculus. The relationship contemplated in the proposed lease would primarily benefit a private entity, Epic, which would gain access to and use of county-owned property that it would not be entitled to obtain from the Commission on its own. Unlike the scenario presented in *Coghill*, the construction of a public parking lot, there is no indication from the proposed agreement how the public would benefit from the operation of a private business on county land—the facility would presumably be available to the public, but patrons would be private business customers, not public guests. It also appears that the entire building (or at least the vast majority of it) will be used to operate the escape room facility, which is more than the limited number of parking spaces allocated for sale in *Coghill*, and more than the top floor of a three-story building that we concluded in the 2014 Opinion would violate the "public purpose" test.

Further, although *Coghill* and the 2014 Opinion involved situations where the city or county commission contracted directly with private entities, we conclude that the same result holds in the context of a sublease. To conclude otherwise—that is, to conclude that Section 7-1-3hh prohibits the Commission from leasing directly to a private entity for private purposes, but not indirectly where the Fayetteville CVB is essentially an intermediary between the Commission and Epic—would permit an end-run around the statute's text and purpose. Under the statute, the Commission can lease county property to a government entity *only* for a public purpose; if the entity sublets to a private business for private use, the primary lease would become invalid because it would no longer satisfy Section § 7-1-3hh's public purpose requirement. Such an arrangement would thwart the Legislature's purpose to ensure that public property is used for private gain only where that purpose is ancillary to a "primary and dominant" goal to benefit the public.

In short, the private benefits to a private business under the proposed plan would likely be "so overwhelming, compared with the public benefits," that the "primary and dominant purpose" of the proposal appears to be the conferral of private benefits. *Coghill*, 156 W. Va. at 884, 207 S.E.2d at 118. Absent legislative action—such as an amendment to allow county commissions to lease land to for-profit entities or to expand the scope of permitted "public purposes"—the proposed plan would likely not withstand scrutiny under existing law.

Nevertheless, that is not to say that any proposed lease to the Fayetteville CVB would be impermissible under Section 7-3-1hh simply because the intended purpose requires involvement of a private company. For instance, the statute's "public purpose" requirement may well be satisfied if the Fayetteville CVB retained control of the premises and *itself* operated an escape room game facility for the public's benefit, perhaps paying Epic or another company as a contractor to manage day-to-day operations. Such an arrangement would more closely resemble the City of Charleston's decision to operate a public parking garage in *Coghill*, and any financial

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benefits to a private contractor would likely be considered “ancillary and incidental” to the primary, public purpose of that lease. 156 W. Va. at 884, 207 S.E. 2d at 118.

Sincerely,



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