



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

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The Honorable Charles E. King, Jr.
Kanawha County Prosecuting Attorney
Judicial Annex
Charleston, West Virginia 25301

Dear Mr. King:

This is in reply to your letter requesting us to respond to the Kanawha County Commission's inquiries regarding its authority to consolidate county government services with those provided by incorporated municipalities. The questions posed by the Commission are quoted below, each followed immediately by our response.

"1. A. Are there any constitutional limitations to the municipal powers which may be exercised by a county commission?"

Yes, the powers of county commissioners are constitutionally defined and limited by Article IX, Section 11, of the West Virginia Constitution, which states, in part:

"The county commissions, through their clerks, shall have the custody of all deeds and other papers presented for record in their counties, and the same shall be preserved therein, or otherwise disposed of, as now is, or may be prescribed by law. They shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies: Provided, that no license for the sale of intoxicating liquors in any incorporated city, town or village, shall be granted without the consent of the municipal authorities thereof, first had and obtained. Until otherwise prescribed by law, they shall, in all cases of contest, be the judge of the election,

qualification and returns of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise, as may be prescribed by law. Such commissions may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law. * * * (Emphasis supplied.)

The above-quoted language has been interpreted numerous times to vest in the Legislature plenary power to regulate the constitutionally prescribed duties of county commissions, and to preclude the county commissions from exercising any authority not expressly given them by this section or by statute, or by necessary implication from these express powers. See Berkeley County Commission v. Shiley, ___ W. Va. ___, 295 S.E.2d 924 (1982); State ex rel. County Court of Cabell County v. Arthur, 150 W. Va. 293, 145 S.E.2d 34 (1965); Barbor v. County Court of Mercer County, 85 W. Va. 359, 101 S.E. 721 (1920).

In Taylor County Commission v. Spencer, ___ W. Va. ___, 285 S.E.2d 656 (1981), the Supreme Court of Appeals stated, "We find no prohibition in the constitution [of West Virginia] against the exercise by county government of powers ordinarily associated with municipalities," but this sentence, read in context, refers to the Legislature's power to confer such authority upon county commissions. The quoted language cannot be read as authorizing county commissions to exercise municipal powers in the absence of statutory authority to do so. For instance, a municipality is authorized by statute to abate public nuisances [W. Va. Code § 8-12-5(23)] while county commissions are not. "The Legislature has not given to the county commissions, as it has to municipalities, a general power to abate public nuisances." Berkeley County Commission v. Shiley, supra, at 926.

The Constitution, however, poses no prohibition upon the Legislature which would preclude it from granting to county commissions further powers ordinarily associated with municipalities.

"B. If so, what municipal powers are excluded and under what constitutional authority?"

As previously stated, a county commission is authorized to exercise only such powers as are conferred upon it by constitutional or statutory provisions.

"A county commission only has powers expressly conferred by the West Virginia Constitution and our State Legislature, or powers reasonably and

necessarily implied for exercise of those expressed powers. [Citation omitted.] It can only do those things that are authorized and only in the manner or mode prescribed by law. [Citation omitted.]" Berkeley County Commission v. Shiley, 295 S.E.2d at 926.

Thus, Article IX, Section 11, of the West Virginia Constitution effectively prohibits county commissions from exercising any municipal powers not expressly conferred by said provision or by statute.

"2. A. Are there any nonconstitutional limits to the municipal powers which may be exercised by a county commission?

"B. If so, what municipal powers are excluded and under what authority?"

The powers of municipal corporations are set forth and limited by Article VI, Section 39(a), of the West Virginia Constitution, and by Chapter 8 of the West Virginia Code (principally Code 8-12-5). By contrast, the powers of county commissions are set forth and limited by Article IX, Section 11, of the West Virginia Constitution and Chapter 7 of the West Virginia Code (principally Code 7-1-3 through -11). Although a few of the express powers of county commissions are similar to those granted to municipalities, there is no constitutional or statutory provision giving a county commission general authority to exercise municipal powers. A county commission is therefore without authority to do so. Berkeley County Commission v. Shiley.

Further, many statutes granting specific powers to county commissions expressly limit such powers to geographical regions outside the limits of incorporated municipalities. For instance, a county commission's powers to provide garbage and refuse collection services, operate sewage systems, promulgate housing and building codes, and improve or close streets generally cannot be exercised within the boundaries of an incorporated municipality. Code 7-1-3a; Code 7-1-3f, Code 7-1-3g, Code 7-1-3h; and Code 7-1-3n.

Thus, to the extent that county commissions are statutorily authorized to perform functions similar to municipal functions, they are usually expressly prohibited from doing so within the boundaries of a municipality.

- "3. Can a municipality merge into a county government under existing constitutional and statutory authority?"

No. Existing law does not authorize an incorporated municipality to merge into a county government, nor does it authorize a county government to exercise the powers conferred upon incorporated municipalities within its boundaries.

Counties and municipalities may, however, enter into agreements to consolidate services which they are otherwise empowered by statute to provide. Many of the aforementioned powers of county commissions which are limited to nonmunicipal territory may be exercised within municipalities pursuant to statutory exceptions permitting counties to contract with municipalities for that purpose. (See, e.g., Code 7-1-3a and Code 7-1-3f) None of these exceptions permit the county to unilaterally supersede municipal authority; nor do they permit a municipality to be governed by a county tribunal.

Code 7-1-3i and Code 8-23-3 authorize county commissions to enter into cooperative agreements with municipalities to jointly carry out functions that each is otherwise authorized to perform unilaterally. Neither of these statutes confers upon the commission any power which it does not otherwise possess. Thus, such an agreement cannot legally authorize a commission to perform any municipal function that is not already within the commission's power.

- "4. A. If a county government undertakes to exercise all permitted powers of a municipality, what is the status of and what happens to the existing municipal government?
- "B. Under such circumstances, can a municipal government dissolve?"

As shown by our previous responses, the situation contemplated by questions 4A and 4B cannot exist under current statutory provisions.

"5. Under Article 9, Section XIII, can a county reform its county government so that commissioners or similar representatives are elected from districts such as magisterial districts?"

In Taylor County Commission v. Spencer, supra, the Supreme Court of Appeals clearly endorsed the state constitutional procedure embodied in Article IX, Section 13, for changing the form of a county government. The constitutionally mandated procedure is initiated by a petition signed by 10 percent of the registered voters of the county, describing the form of county government desired by the petitioners. The Legislature must then enact legislation reflecting the form of government designated by the petition, which is then subject to the approval of a majority of voters of the county voting at an election. Only after such an election is the legislation effective.

"The framers of this provision * * * wisely chose to leave the ultimate determination of the form of government which would best serve the interests of the county in the hands of * * * the people of the county." 285 S.E.2d at 660.

Only by following this procedure can the voters of the county reform, alter, or modify the county commission. Said procedure is the exclusive means to achieve such a modification. In Taylor County Commission, an attempt was made to modify the Taylor County Commission so that its members were elected from magisterial districts. The attempt was set aside because the constitutionally mandated procedure was not followed. Consequently, the court expressed no opinion on whether any other constitutional provision would prohibit the election of commissioners from separate magisterial districts.

In 1963, Attorney General C. Donald Robertson issued an official opinion on this issue, and concluded that county commissioners, or the members of any tribunal serving in lieu of a county commission, must be elected at large by all county voters. 50 Rep. of the Atty. Gen. 202 (Feb. 21, 1963) (copy enclosed). His conclusion was based on the constitutional requirement that county commissioners "shall be elected by the voters of the county, * * *" which language presently appears in Article IX, Section 10 of the West Virginia Constitution. He therefore concluded that a special legislative enactment, providing that the Grant County Commissioners be elected from separate magisterial districts, was unconstitutional. The special enactment was enacted pursuant to the predecessor provision to Article IX, Section 13 of the West Virginia Constitution,

which provided a procedure for the county's voters to reform their county commission.

We are unaware of any petition seeking to reform the Kanawha County Commission such that its commissioners are elected from separate magisterial districts, so the question you pose appears to be purely hypothetical. In the absence of a petition seeking a specific plan of reorganization, it would not be appropriate for us to reevaluate our earlier opinion on this issue.

Very truly yours,

CHARLES G. BROWN
Attorney General

By  Deputy
SILAS B. TAYLOR

SBT/lfb/mlk