



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

CHARLIE BROWN
ATTORNEY GENERAL

February 25, 1987

Dr. Thomas W. Cole, Jr., Chancellor
West Virginia Board of Regents
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

Dear Dr. Cole:

This opinion is in response to your written request of January 21, 1987, which sought guidance concerning the question of whether the West Virginia Board of Regents can lease property owned by it at Marshall University to the Marshall University Foundation for the purpose of private development.

Your request read:

"The purpose of this letter is to seek an opinion on a venture being proposed by Marshall University. The University wishes to lease some property across third avenue (currently used for University parking) to the Marshall University Foundation. The intent of that lease would be to make it possible for the Marshall University Foundation to enter into an agreement with a private developer for the purpose of constructing a multi-million dollar facility for the purpose of retail sales, office space and apartment dwellings. It is also being proposed that the developer would commit between 20 and 25 percent of net profits of that facility to the Marshall University Foundation, which will be used to further the academic programs at Marshall University.

"As an additional part of the project, the City of Huntington has agreed to construct a multipurpose parking facility on .

property owned by the City that would provide for the parking spaces lost and provide additional spaces for students, faculty, and staff at no additional cost and to the general public which are not now available. The real assets of this project would be to bring to campus additional parking spaces for employees and visitors.

"The obvious major advantage to the State would be a potentially large sum of additional private dollars which would be brought to the State for the support of higher education for programs that the State is not now able to provide. Another distinct advantage to the State would be the ability to provide suitable apartment dwellings for students attending Marshall University, without the added expense of constructing a new dormitory facility. The apartments would be close enough to provide students access to classes within walking distance.

"The question is can the West Virginia Board of Regents lease the property across third avenue to the Marshall University Foundation for the purpose of private development?"

Previous opinions issued by this office advised that under certain conditions property owned in fee simple by the Board of Regents may be leased to private interests. See 58 Ops. Att'y Gen. 166 [1978-1980]; 59 Ops. Att'y Gen. 173 [1980-1982]; 60 Ops. Att'y Gen. 67 [1982-1984].

The first of the opinions above dealt with a proposal to lease land at West Virginia University to the West Virginia University Foundation, a non-profit corporation, for the construction of an athletic facilities building adjacent to the new football stadium. The building was to be financed by private contributions and a bond issue and then leased back to the Regents, with a pledge of certain athletic contests' admission fees to be pledged by the University toward repayment of the bonds.

In the opinion of January 24, 1980, to then Chancellor Ben L. Morton, this office reiterated that W. Va. Code § 18-23-1 et

seq. grants very broad powers to the Board of Regents, including the authority to sell or exchange property held by or for state institutions of higher education. See Code 18-23-3. In the specific circumstances of that proposal, this office concluded that it would be proper for the Board of Regents to lease its land to a private foundation as long as the governor consented to said lease, the purpose for which the land was to be leased was an appropriate and proper one directly related to the operation of the University, and Board of Regents' funds were not pledged toward any repayment of bonds that a third party might issue to finance construction of the facility on the leased land.

In your letter you set out the opinion that the proposal at hand would generate savings for the state as well as additional funding for programs the state is not presently able to provide. This, of course, is relevant to the consideration of whether or not the purpose to which the leased land would be put is an appropriate and proper one directly related to the operation of the University. Instructive on this point is the July 15, 1983, opinion of this office cited above. There, this office concluded that a proposal by the Regents to lease land to a private developer for the purpose of constructing, maintaining, and equipping a residence hall for students was proper, so long as the proposal resulted in a savings to the state over other methods of financing the construction. It was felt that providing housing for students was an appropriate and proper purpose for use of the Regents' land.

In your letter, you cite the construction of apartment dwellings for students as one benefit of this proposal, as well as needed parking facilities and added revenues for academic programs. Alone, each of these benefits could conceivably satisfy the requirement that the leased land be used in a way that is related to the institution's requirements and purpose. In its opinion of February 26, 1982, cited above, this office deemed it proper for a Board of Regents' institution to lease part of its land for coal development when the only benefit flowing to the institution from the proposed lease agreement consisted of revenues from coal royalties. Since the proposal you offer would generate both housing for students and needed revenues unobtainable otherwise, this office feels the terms of the agreement as put forth in your request are proper and related to the statutory purpose of the Board of Regents.

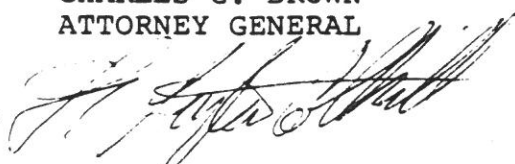
We must caution you, though, that any final agreement to lease the noted land must be approved by the Governor under Code 18-23-3 and be examined for compliance with the statutory terms

of Code 12-3-17, which sets forth the conditions and clauses which must be contained in long-term lease agreements. As well, any agreement encompassing the proposal outlined in your letter must be approved as to form by this office before being executed.

Very truly yours,

CHARLES G. BROWN
ATTORNEY GENERAL

By



Assistant

F. LAYTON COTTRILL

CGB/FLC/rm