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September 7, 1993

The Honorable Gaston Caperton
Governor of West Virginia
Office of the Governor
Capitol Complex
Charleston, WV 25305

Re: Appointment of Members to the
West Virginia State Building Commission

Dear Governor Caperton:

Thank you for your letter of August 25, 1993 requesting clarification of an opinion of this Office dated August 2, 1993 regarding appointments to the West Virginia State Building Commission. We appreciate the opportunity for further comment on this issue.

At a meeting of the State Building Commission held on July 20, 1993, the Commission voted to request an opinion from this Office as to whether or not gubernatorial appointees to the State Building Commission who have not yet been confirmed by the West Virginia State Senate should formally participate in the business and activities of the State Building Commission. We responded on August 2, 1993.¹

Article 7, Section 9 of the West Virginia Constitution provides, in pertinent part, that "in case of a vacancy, during the recess of the Senate, in any office which is not elective, the governor shall, by appointment, fill such vacancy, until the next meeting of the Senate, when he shall make a nomination for such office, and the person so nominated, when confirmed by the Senate (a majority of all the senators elected concurring by yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. . . ."

This constitutional provision is, of course, necessary because the State has a part-time Legislature. As is well-established, the law abhors vacancies in public office. Thus, Article VII, section 9 of the Constitution provides a mechanism

¹The August 2, 1993 response is attached hereto and incorporated herein.

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whereby vacancies occurring during the recess of the legislature can be filled and the work of various public offices, boards and commissions continue until the next term of the legislature.

Article VII, section 9 is framed in nondiscretionary language. When, during a recess of the Senate, a vacancy occurs, it is the absolute mandatory duty of the governor to fill such vacancy by appointment. See e.g., State ex rel. Brotherton v. Moore, 230 S.E.2d 638 (W. Va. 1976); State ex rel. Wayne v. Sims, 90 S.E.2d 288 (W. Va. 1955). In the instance of a vacancy, the governor has a duty to make an appointment.

A governor cannot avoid this mandatory duty. To do so can result in the accumulation of vacant positions held against the day when a governor may need a board or commission favorable to his or her position on an issue of public interest that must be addressed. The governor has a duty to make appointments as the vacancies occur. The appointees have the ability to serve in the window period until the next meeting of the legislature.

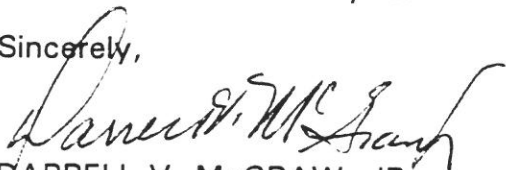
The problem existing within the context of the West Virginia State Building Commission is that the vacancies were longstanding. In fact, it is our understanding that one of the vacancies had existed since 1989. Thus, there were numerous opportunities to nominate and fill vacancies during repeated legislative sessions. The appointment to fill the positions did not occur in the window period "until the next meeting of the Senate" as is required by Article 7, Section 9 of the Constitution.

You need to be aware that this Office relies upon a conservative construction of the language of the Constitution. Courts are not constrained by conservative construction and may consider politics, economics, public policy, history and the social sciences in reaching results. In the context of contested cases, the courts can and often do make accommodations to validate a result. We do not have that luxury.

You also ask whether, and on what basis, the August 2, 1993 opinion affects other appointments made by you during the recess of the Senate. We respectfully decline to answer such an abstract question. The answer may vary from one appointment to another, depending upon the specific statutory language involved and the particular factual circumstances surrounding the appointment.

Thank you for your inquiry. We hope this response, which formally will be made part of the August 2, 1993 opinion, will be of assistance to you.

Sincerely,


DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL