



Goodwin & Goodwin, LLP
300 Summers Street
Suite 1500
Charleston, WV 25301-1678

T (304) 346-7000
F (304) 344-9692

www.goodwingoodwin.com

Sender's Contact: Booth Goodwin
Direct: 304-346-9700
rbg@goodwingoodwin.com

February 9, 2017

The Honorable Marty Gearheart
Co-Chairman
The Joint Legislative Oversight Commission on
Department of Transportation Accountability
West Virginia Legislature
Building 1, Room 200 E-A
Charleston, West Virginia 25305

Re: DOH Litigation Attacking West Virginia Paving Companies

Dear Chairman Gearheart:

I write to you and the Commission on behalf of my client, West Virginia Paving, Inc., and in response to the February 7, 2017 letter to you from Michael Folio, legal director for the Division of Highways. While this matter is, sadly, subject to present litigation before the Circuit Court of Kanawha County, I nonetheless feel the need to correct a number of inaccuracies contained in Mr. Folio's letter and to make my clients' situation known to this committee.

DOH has required the Attorney General to attempt to clean up frivolous litigation DOH hastily and improvidently started.

Mr. Folio tells this Commission that he and a Charleston plaintiffs' firm have been urging the Attorney General to sue my clients for some time now, but until recently, the Attorney General declined to do so. Still, it is clear from DOH's actions to date and Mr. Folio's letter that the DOH acted hastily and with suspect information in filing suit against several paving companies, including my clients. The DOH lawsuit is unfounded. There has been no market manipulation, there has been no vast conspiracy, and there certainly has not been a supposed large price increase, as the Plaintiffs have been fond of saying. It appears that Mr. Folio has led many astray, including the Attorney General, or the Attorney General is simply attempting to clean up frivolous litigation DOH hastily and improvidently started.

Mr. Folio states that he wants to "reform West Virginia's asphalt market." I have to imagine that you and your Commission members would agree that bringing a lawsuit is not an efficient or effective way to do that. In fact, West

Virginia Paving has suggested reforms to the DOH, but Mr. Folio has repaid our concern with a massive lawsuit. As this Commission likely is aware, the Legislature commissioned an audit of DOH by Deloitte. See [Exhibit 1](#). Deloitte suggested a number of recommendations, but DOH apparently has not tried to implement any of them. For example, the Audit report suggested that DOH “analyze the asphalt mix designs and specifications with different states in terms of quality and lifespan of finished product”—DOH requires its contractors to be able to produce as many as 60 different mix designs, many of which are of questionable value. We have made this same suggestion to DOH on multiple occasions, which suggestion seems to have fallen on deaf ears. We believe that this one simple step alone would result in huge cost savings to the public and allow for more roads to be paved with longer lifespan of the finished product. Likewise, the DOH does not allow more than 15% recycled asphalt product in its mix designs when surrounding states permit a much higher amount. Again, a simple change like this could save a substantial amount of money while not sacrificing quality.

The Deloitte report also outlines several factors that substantially affect the price of asphalt and asphalt paving throughout the state—none of which have anything to do with the number of competitors manufacturing asphalt or performing asphalt paving. Those factors include proximity to asphalt plant locations, existing terrain conditions, and vicinity to aggregate quarries. Another large factor in the price of asphalt is the price of asphalt cement (also known as liquid asphalt). Liquid asphalt is a petroleum product produced by companies such as Marathon Oil and its price fluctuates with the price of oil much as the price of gasoline does. Neither West Virginia Paving nor any of the other paving companies attacked by DOH and Mr. Folio have anything to do with the production or price of asphalt cement.

These undisputed facts show that the real drivers of asphalt prices lie largely with the larger oil and petroleum market and with DOH’s own onerous specifications. Another driver of asphalt prices is the production cost itself. DOH should be quite familiar with this because it considered building its own series of asphalt plants, but ultimately decided against doing so. See [Exhibit 2](#). In fact, that internal report shows that DOH likely could not produce asphalt cheaper than the private market.

These reports show that prices are driven largely by costs outside the control of West Virginia Paving. Some of these drivers—like the needless and onerous specifications—are within the control of DOH, ironically enough. It is facts like these which would understandably give the Office of the Attorney General pause in bringing or continuing this lawsuit. Indeed, this is the role that such office is supposed to serve: by having all legal actions go through one

democratically elected, constitutionally appointed officer like the Attorney General, rogue agency lawyers are less likely to bring ill-advised, half-cocked lawsuits and start fights that the State cannot win. Here, it appears that Mr. Folio's ego is getting the best of him.

Mr. Folio's attempt to hire lawyers without the Attorney General is plainly wrong.

In his letter, Mr. Folio maintains that he, as a state government agency lawyer, has the ability to hire outside counsel and bring significant litigation, all without any role or input or participation of West Virginia's democratically elected, constitutionally appointed lawyer and "chief legal officer."¹ *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 31–32, 569 S.E.2d 99, 107–08 (2002). Incredibly, he takes this line of reasoning despite the plain, unambiguous statutory language adopted by the West Virginia Legislature that "[t]he state may not enter into any contingency legal fee arrangement or contract with a private attorney unless the Attorney General" approves through a mandatory bidding process. W. Va. Code § 5-3-3a(b). Mr. Folio maintains that he should be able to disregard this clear statute simply because the Attorney General did not blindly accept and file some draft complaint cobbled together by private plaintiffs' lawyers. While prior Attorneys General may have had such dealings in the past, we all know that is **not** how the Office of the Attorney General is supposed to operate.

Mr. Folio offers shoddy legal analysis in support of his theory that DOH is entitled to hire lawyers and bring suits all on its own. In providing this half-baked legal opinion, Mr. Folio neglects to mention a plethora of directly on-point Supreme Court of Appeals cases, provisions of the West Virginia Code, or relevant portions of the West Virginia Constitution. *See, e.g., State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002); *State ex rel. Caryl v. MacQueen*, 182 W. Va. 50, 54, 385 S.E.2d 646, 650 (1989) ("[T]he Attorney General remains the legal representative of the State and its agencies unless specifically exempted by statute."); *see generally* West Virginia Paving, Inc.'s Motion to Dismiss, attached as [Exhibit 3](#). For example, one of the authorities that Mr. Folio declines to mention is the clear dictate of the Supreme Court of Appeals of West Virginia on this very issue: "***In all instances*** when an executive branch or related State entity represented by counsel before a tribunal, ***the Attorney General shall appear upon the pleadings as an***

¹ Somewhat to his credit, Mr. Folio states that he does not ask for "unrestrained authority" to make an end-run around the Attorney General, but only says he can do so "under the peculiar circumstances of his matter." In effect, he does not ask for blanket authority unchecked by democratically elected officials, he rather only asks for that authority when other democratically elected officials do not do what he tells them to do.

attorney of record.” Syl. Pt. 7, *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002) (emphasis added). Mr. Folio and DOH, an executive branch entity, argue that they can go before the Courts with a lawsuit and that they can do so without the Attorney General as counsel of record. Mr. Folio has either (1) disingenuously decided to gloss over these directly contrary—and binding—authorities or (2) he is entirely unaware of them. Rather than using these authorities, Mr. Folio instead relies on one sentence in an email from the outside plaintiffs’ lawyers whom he improperly tried to hire. Not once does Mr. Folio cite the above cases or any constitutional provision. In effect, Mr. Folio would interpret the Supreme Court’s phrase “***in all instances***” to mean “in all instances, ***unless*** some agency lawyer and a private plaintiffs’ law firm think otherwise.”

West Virginia Paving remains committed to doing what is right for the State of West Virginia

My clients and I were dismayed to see that Mr. Folio and DOH apparently do not want to address the suggestions offered by West Virginia Paving and the Legislature’s own report from Deloitte. Rather, Mr. Folio is more concerned with unfairly maligning my clients and improperly inducing the Attorney General to bring an unfounded lawsuit at the behest of private plaintiffs’ lawyers whom he is now personally recommending.

While we recognize the Attorney General now brought his own action, we believe that he did so based on faulty information provided to him by or through Mr. Folio, who in turn, blindly accepts the bidding of others and some unnamed “antitrust expert.” Unlike Mr. Folio, though, we understand that the Attorney General is the real attorney for the State. We therefore look forward to working with the Attorney General’s Office to cooperatively review the facts of this matter and hopefully address any legitimate concerns short of lengthy, protracted, and totally unnecessary litigation.

Sincerely,



R. Booth Goodwin II

cc: The Honorable Roman Prezioso
Members of the Commission (via Email)