

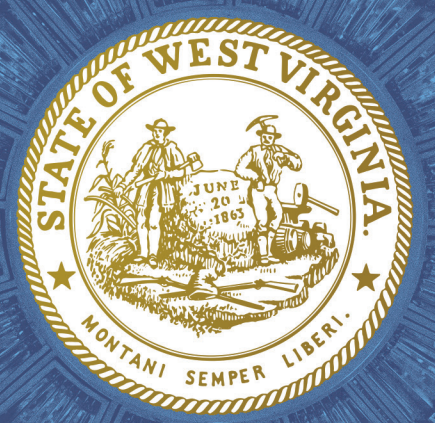
JOINT COMMITTEE ON GOVERNMENT AND FINANCE  
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

# POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

## West Virginia Division of Highways - Property Lease Management

Legislative Auditor: Aaron Allred  
Post Audit Division Director: Justin Robinson



GENERALLY ACCEPTED GOVERNMENT  
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

POST AUDIT DIVISION  
Justin Robinson, Director

# POST AUDIT DIVISION

POST AUDITS SUBCOMMITTEE  
MEMBERS

SENATE MEMBERS	HOUSE MEMBERS
<i>President, Craig Blair</i>	Roger Hanshaw, <i>Speaker</i>
Mark Maynard	Brandon Steele
Stephen Baldwin	Chad Lovejoy



## West Virginia Division of Highways - Property Lease Management

January 9, 2022

### LEGISLATIVE AUDITOR'S STAFF CONTRIBUTORS

Aaron Allred.....Legislative Auditor

Justin Robinson.....Director

Adam R. Fridley, CGAP..... Audit Manager

Nicholas Hamilton.....Senior Auditor

Sarah Clere..... Auditor

Christopher Canada..... Auditor

Nathan Hamilton.....Referencer

EXECUTIVE SUMMARY: PAGE 1

ISSUE 1: PAGE 3

*Significant Deficiencies in the West Virginia Division of Highways' Management of Its Leased Properties Could Create Potential Liability Exposures for the State of West Virginia.*

APPENDIX A: PAGE 15

*Transmittal Draft Letter*

APPENDIX B: PAGE 17

*Objective, Scope, & Methodology*



# EXECUTIVE SUMMARY

The Legislative Auditor conducted this audit on the Division of Highways in accordance with W. Va. Code §4-2-5. The objective of this review was to Determine the extent to which the Division of Highways' Right of Ways Division is ensuring that its property leases are properly executed and enforced. Specifically, the objective will evaluate whether:

- the Division of Highways Right of Ways Division is properly billing and collecting the documented consideration established in its leases and if collection is taking place within the correct timeframe.
- the Division of Highways Right of Ways Division is ensuring that lease rental amounts are established in accordance with the appraised fair market value of the property, and that such rental amounts are updated every five years, if applicable, based upon the existing market conditions; and
- the Division of Highways Right of Ways Division is executing all leases, including those below fair market rental value, in accordance with the requirements of W.Va. Code.

## Frequently Used Acronyms in This Report

CPA: Certified Public Accountant  
FMRV: Fair Market Rental Value

DOH or WVDOH: Division of Highways  
ROW: Right of Way

## Report Highlights

### **Issue 1: Significant Deficiencies in the West Virginia Division of Highways' Management of Its Leased Properties Could Create Potential Liability Exposures for the State of West Virginia.**

- An analysis of a sample of DOH property leases identifies a myriad of issues related to the establishment of fair market rental values and the collection of stated consideration in each lease agreement.
- The DOH has executed seven leases with private entities for a nominal lease amount (i.e., \$1 per year). While Legislative Rule allows the DOH to lease property to public bodies for below Fair Market Rental Value if the land is used for a public purpose, these seven entities do not appear to meet the definition of "public body" and therefore should not be receiving rental amounts below Fair Market Rental Value.
  - The term "public purpose" is not clearly defined in statute or legislative rule. DOH has adopted a broad and general interpretation of the term but has not clearly defined it in its internal policies.
- Nine (9) of the property leases lack language that clearly indemnifies the State of West Virginia from claims, suits, or other liabilities related to the lessee's use of the property.

## Recommendations

1. The Legislative Auditor recommends that the Division of Highways supplement or amend each of its property leases with public bodies to include language that indicates the public benefit provided through the lease agreement serves as consideration for the lease.
2. The Legislative Auditor recommends the Division of Highways formally define key terms and phrases such as “public body” and “public purpose” in its Legislative Rule and/or the Division of Highways’ Right of Way Manual.
3. The Legislative Auditor recommends the Division of Highways seek to amend either all lease agreements below FMRV to private entities or the Legislative Rule to allow it more flexibility when leasing properties for public purposes.
4. The Legislative Auditor recommends that the Division of Highways supplement or amend all property leases with terms in excess of five years, which are not for utility accommodations, to facilitate the updating of lease terms at least every five years.
5. The Legislative Auditor recommends that the Division of Highways ensure that all current leased property is operating on a current and unexpired lease agreement.
6. The Legislative Auditor recommends that the Division of Highways ensure that all property leases have current written appraisals unless they meet the exemption stipulated in Legislative Rule.
7. The Legislative Auditor recommends that the Division of Highways review all of its property leases to ensure that the appropriate indemnification language is present and supplement or amend existing lease agreements that lack such language to include it therein.

## Post Audit’s Response to the Agency’s Written Response

On December 21, 2021, the Legislative Auditor transmitted a draft copy of this report to the Secretary of the Department of Transportation. In addition to providing a draft copy for its review, the Legislative Auditor offered the Department an exit conference to discuss any questions, concerns, or issues the Department may have had with the report’s findings and conclusions. On December 29, 2021, a representative from the Department informed the Legislative Auditor, “[P]lease be advised that Secretary Jimmy Wriston, P.E. does not require an exit conference on behalf of DOH. Please note, Secretary Wriston has no written comments to be included in your report.”

# **Issue 1: Significant Deficiencies in the West Virginia Division of Highways' Management of Its Leased Properties Could Create Potential Liability Exposures for the State of West Virginia.**

## **Issue Summary**

Since 2019, the annual independent financial audit of the West Virginia Division of Highways (DOH) has contained repeat findings regarding the DOH's management of property leases in its Right of Way (ROW) Division. In each of its last three audit reports, Suttle & Stalnaker, PLLC has examined a sample of 25 property leases maintained by the ROW Division and found at least one lease that presented issues with the lease agreement, collection of payment, or both.

However, since neither the property values nor the lease amounts rise to the level of significance for a financial statements audit, Suttle & Stalnaker did not make DOH's lease management a focus of its audits.

The Legislative Auditor conducted this audit of DOH's property leases to better quantify the nature and extent of issues previously identified through the DOH annual financial statements audits and identify the potential causes and effects of these issues. To achieve this objective, the Legislative Auditor reviewed a sample of 86 property leases out of a total of 378. The results of this analysis identified the following issues:

- Twenty-three (23) of the lease agreements have lease terms in excess of five years. According to a legal opinion obtained from Legislative Services, current West Virginia Code limits the maximum lease term of all DOH property leases to five years unless they are for utility accommodation leases.
- The DOH is not collecting the nominal consideration (often \$1 per year) for lease agreements with public bodies.
- The DOH has executed seven leases with private entities for a nominal lease amount (i.e., \$1 per year). While legislative rule allows the DOH to lease property to public bodies for below Fair Market Rental Value (FMRV) if the land is used for a public purpose, these seven entities do not appear to meet the definition of "public body" and therefore should not be receiving rental amounts below FMRV.
  - The term "public purpose" is not clearly defined in statute or legislative rule. DOH has adopted a broad and general interpretation of the term but has not clearly defined it in its internal policies.
- Many leases, including nearly all leases to public bodies, lack a written appraisal or determination of FMRV, as required under current state law.
- Nine (9) of the property leases lack language that clearly indemnifies the State of West Virginia from claims, suits, or other liabilities related to the lessee's use of the property.
- An additional eight property leases have continued beyond their agreed upon lease terms and/or have extended beyond the allowed renewals per the terms of the lease.

The Legislative Auditor notes that the issues noted herein present potential liability exposures to the State of West Virginia and in some instances, may even jeopardize the validity of the contractual agreements between the State and the lessees. Moreover, many of these deficiencies can be easily remedied internally by the DOH by amending the lease agreements. In those instances where current DOH practices stand in conflict with West Virginia Code, the DOH should either seek to work with the Legislature to modify the statutes, or bring its current lease agreements and leasing practices into compliance with the law.

## Background

The primary function of the DOH's ROW Division is to acquire all real estate that is necessary for the construction and maintenance of public roads or highways in the State that fall under the jurisdiction of the DOH. In carrying out this function, the ROW Division may acquire more land than what is strictly necessary to build or maintain public roadways through either excess right of way or uneconomic remnants.

An uneconomic remnant is a parcel of land that as a result of a partial acquisition of adjoining land has little or no economic or market value to the owner. Under existing law, the DOH is required to make an offer to purchase any uneconomic remnants resulting from the acquisition of parcels necessary to build or maintain public roadways.

Current law gives the DOH options for the disposition of excess real estate under its ownership via either permanent means (sale, auction, exchange, abandonment), or via temporary disposition by leasing the excess real estate. According to the DOH's *Right of Way Manual*:

*Real Property owned by the WVDOH may be leased to others when it has been determined:*

- 1. It is excess but cannot be sold or exchanged.*
- 2. It is not excess but the need for it for the WVDOH's purposes is not imminent.*
- 3. Its use under the lease does not interfere with an existing use by the WVDOH.*

According to documentation provided by the DOH, as of March 2020, it has executed lease agreements for 378 parcels of excess real estate. These lease agreements cover a total area of nearly 700 acres (or just over 1 square mile) of real property across the State of West Virginia. Leases have been made with entities both public and private for a myriad of reasons, including parks, roadside memorials, signage, parking lots, and coal mining operations.

Property leases executed by the DOH must comply with various requirements established in 157 CSR 2. Among these requirements, DOH must obtain prior approval from the District Manager and Commissioner for each property lease before executing an agreement. In addition, lease rental amounts are required to be based on fair market rental value:

*8.3 Appraisal – Rentals shall be based on a written approval and determination of fair rental value approved by the Commissioner of Highways or his or her designee.*



Leases are limited to a term of five years to allow for updated appraisals of the properties and the determination of current FMRV. Notably, the only exception to the 5-year maximum term, per Legislative Rule, is for utility accommodation leases. Longer terms may be approved for this classification of lease agreements at the Commissioner’s discretion.

Legislative Rule also contains special provisions for DOH leases to “public bodies.” According to 157 CSR 2, section 8.6.11:

*The Division of Highways may lease its property to a public body for an amount less than fair market rental value; provided, that such property is used by that public body for public purposes.*

**Deficiencies in the Division of Highways’ Lease Management for Its Properties Have Been Noted in Each of the Last Three Fiscal Years.**

In accordance with W.Va. Code §17-3-1a, the DOH is subject to a financial statements audit, performed by certified public accountants (CPAs), each fiscal year. Since fiscal year 2019, the annual audit has been conducted by the CPA firm Suttle & Stalnaker, PLLC.

In addition to the audited financial statements, Suttle & Stalnaker is required to report on any material weaknesses or deficiencies it identifies in the DOH’s systems of internal control. A deficiency in internal control is defined in the audit reports as “opportunities for strengthening internal control and operating efficiency.”

Between FY 2019 and FY 2021, Suttle & Stalnaker identified internal control deficiencies in the DOH’s management of its property leases in the ROW Division in each annual audit report. The issues noted in the audit reports ranged from improper payment amounts to missing lease and appraisal documentation. Figure 2 provides a breakdown of Suttle & Stalnaker’s audit findings.

<b>Figure 2 Summary of Findings in Annual Financial Statement Audits Performed by Suttle &amp; Stalnaker FY 2019 - 2021</b>				
	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Totals</b>
Improper Billing	2	1	1	<b>4</b>
Missing Appraisal Documentation	-	1	-	<b>1</b>
Missing Lease Agreement	-	1	-	<b>1</b>
<b>Total</b>	<b>2</b>	<b>3</b>	<b>1</b>	<b>6</b>
<i>Source: Financial Statement Audits performed by Suttle &amp; Stalnaker; FY2019 - 2021</i>				

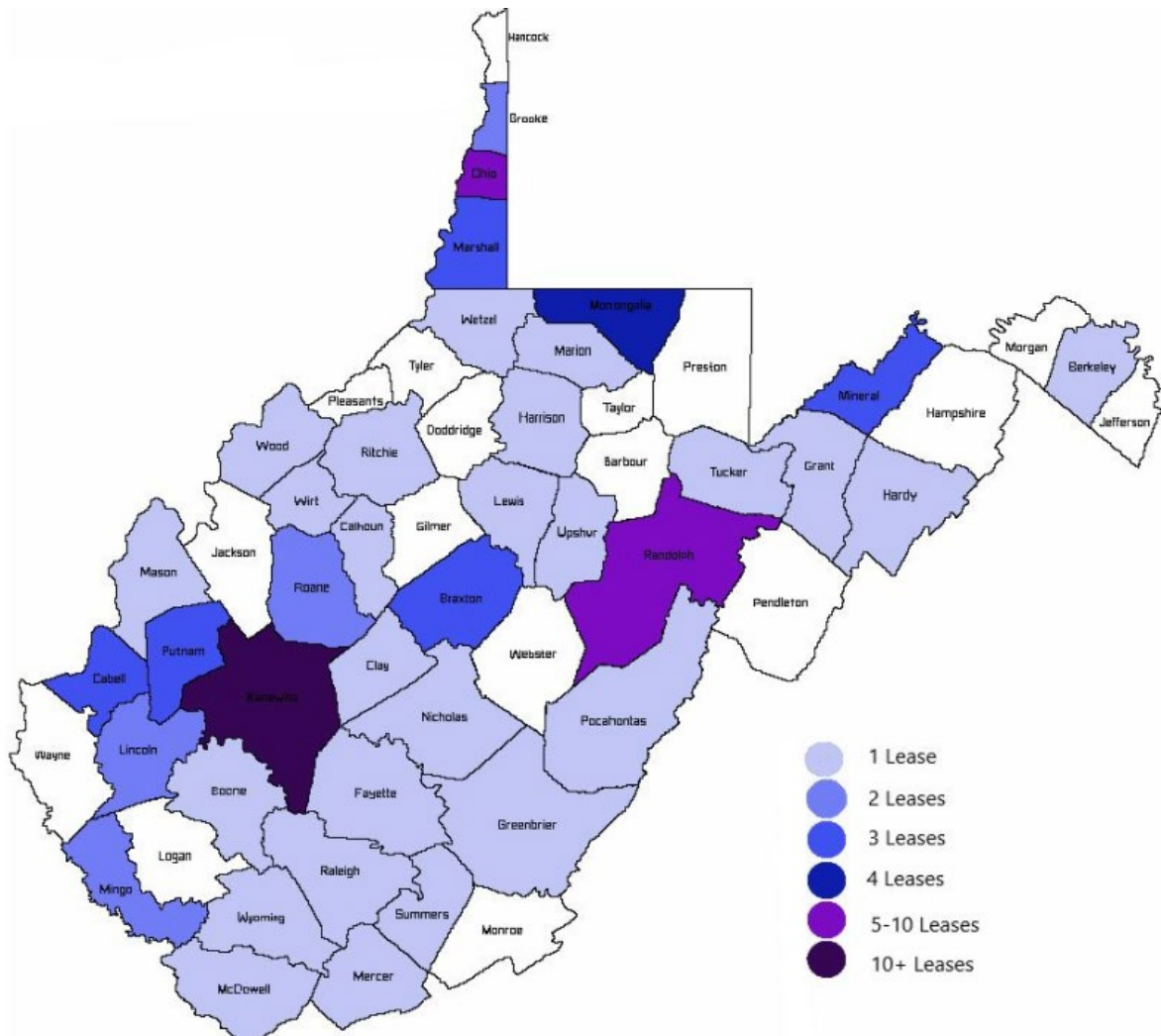
Due to the repeat findings related to the DOH’s management of its property leases, the Legislative Auditor conducted a review of a broader sample of property leases to determine the extent to which DOH is properly managing its leases and whether its leases are in compliance with applicable law.

The Legislative Auditor drew a sample of 86 DOH property leases from the total population of 378. For each property lease included in the audit sample, the Legislative Auditor

requested a current, fully executed copy of the lease agreement, the written appraisal or other determination of fair market rental value, and documentation demonstrating the payment of the agreed-upon rental amount.

The 86 property leases in the sample comprise parcels of land across 38 of West Virginia's 55 counties. Kanawha County is home to the largest number of properties within the lease sample with 21. Ohio (7) and Randolph (6) counties collectively account for 13 leased properties within the sample; no other county accounted for more than 4 properties. Figure 1 provides a breakdown of the leased properties included in the audit sample<sup>1</sup>.

**Figure 1. DOH Property Leases in the Audit Sample, By County**



Source: Legislative Auditor's analysis of DOH property leases.

<sup>1</sup> The Legislative Auditor obtained the geographic information for leased properties from the lease agreements themselves. Since the Legislative Auditor only obtained copies of the leases for those properties that were part of the audit sample, we are unable to provide geographic information for those properties not included in the audit sample.

The majority of property leases in the audit sample (60) are between the DOH and a private entity (for-profits and non-profits). The remaining 26 leases are with public entities such as state spending units, counties, cities, or federal government agencies.

<b>Figure 3 Breakdown of DOH Property Leases by Lessee Type</b>	
<b>Entity Type</b>	<b>Number of Leases</b>
Public Bodies	26
<i>Federal</i>	2
<i>State</i>	10
<i>Local</i>	14
Private Entities	60
<b>Total</b>	<b>86</b>
<i>Source: Legislative Auditor's analysis of DOH leases.</i>	

**The Division of Highways Should Amend Its Property Leases with “Public Bodies” to Better Protect the Interests of the State and Comply with State Law Requiring All Leases to Private Entities be Based on Fair Market Rental Value.**

*Consideration Issues*

As noted earlier, the DOH is authorized to enter into lease agreements with “public bodies” for a rental amount below FMRV if the property is to be used for a public purpose. The Legislative Auditor notes that neither the phrase “public body” nor “public purpose” are defined in the sections of West Virginia Code or Legislative Rules governing DOH property leases. However, “public body” is defined elsewhere in West Virginia Code. W.Va. Code §29B-1-2 defines it as follows:

*(4) “Public body” means every state officer, agency, department, including the executive, legislative and judicial departments, division, bureau, board, and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission council or agency thereof; and any other body which is created by state or local authority or which is primarily funded by the state or local authority.*

Within the audit sample of 86 property leases, the Legislative Auditor identified 26 leases to public bodies. As authorized by 157 CSR 2, section 8.6.11, the Legislative Auditor identified 24 of the 26 leases to public bodies have a rental amount that is clearly below FMRV. These 24 leases have rental amounts often referred to as “nominal consideration” in the amount of either \$1 or with no consideration listed at all.

The Legislative Auditor asked the DOH to provide documentation showing current payment for all leases within the sample, including the 26 leases to public bodies. In response, DOH provided payment documentation for many of the leases in the sample but was unable to

provide any documentation for leases to public bodies that were below FMRV or for nominal consideration. The DOH stated, “*The remaining . . . are \$1.00 leases, which [Accounts Receivable] does not have any documentation to provide to the auditor.*”

According to multiple legal opinions from Legislative Services, the non-collection of even nominal consideration could potentially expose the State to heightened risk of liability. While it may appear to be a technicality, the failure to follow through with the collection of nominal rent amounts could provide an opening to a plaintiff seeking to draw upon the State’s insurance. According to Legislative Services:

*In order for a contract to be valid, there must be an exchange of “consideration”: something of value given from one party to the other to substantiate the agreement. If there is no consideration, then the agreement itself is not complete and not valid. An outside party, such as an injured party, might then bring a claim directly against the state on the allegation that the lease agreement has not been executed and is therefore a sham to escape lawful liability.*

*Though the state could argue that there is, in fact, other valuable consideration, it would be better to avoid this situation altogether. Not only does the Secretary of the Department have a statutory duty to collect these rents under W. Va. Code § 9A-1-10(e), the failure to collect these rents gives a potential opening to a claimant seeking an award of damages from the state.*

While the DOH could alleviate this issue by collecting and processing these nominal rent amounts per the terms of each lease agreement (often, annually), Legislative Services further indicates that this potential issue could be easily remedied by the DOH supplementing the leases and adding language indicating that the public benefit resulting from the lessee’s use of the property serves as consideration.

The Legislative Auditor noted several lease agreements wherein the DOH has included language consistent with the recommendations of Legislative Services. These lease agreements specifically indicate that the lessee shall pay no monetary consideration because the agreement is for government services or otherwise entirely for the public good. **Therefore, the Legislative Auditor recommends that the Division of Highways supplement or amend each of its property leases with public bodies to include language that indicates the public benefit provided through the lease agreement serves as consideration for the lease.**

When asked to define “public purpose,” the DOH indicated to the Legislative Auditor that, “*Public purposes is defined as anything which is meant to enrich the lives of people who reside, visit, and work in the area.*” The Legislative Auditor notes that this definition is very broad and raises questions regarding whether some of the lease agreements reviewed are truly for a “public purpose” such as leases for **commercial** parking or private memorials. **The Legislative Auditor recommends the Division of Highways formally define key terms and phrases such as “public body” and “public purpose” in its Legislative Rule and/or the Division of Highways’ Right of Way Manual.**

### Leases to Private Entities for Nominal Consideration

While the DOH is authorized to lease property to public bodies for nominal consideration, all other property leases must have rental amounts based on the FMRV property. The Legislative Auditor's review of DOH property leases identified seven lease agreements from the sample of 86 leases wherein the DOH entered into a lease agreement with a private entity for nominal consideration. These seven lease agreements have stated consideration amounts ranging from \$0 - \$10. While the DOH did not provide any appraisal documentation for these seven properties, the Legislative Auditor questions whether any of these parcels of land—ranging in size from as small as 1,475 square feet to nearly 28 acres—would have been appraised at nominal rental amounts.

Moreover, while some of the parcels appear to be leased for public purposes, such as a public park/playground area or public parking, others have a clear commercial purpose such as one lease for the operation of a residential youth treatment facility or another lease, with a term of 50 years for \$10, for the purpose of mining coal. Because these seven lease agreements constitute agreements with private entities at rental amounts below FMRV, the Legislative Auditor concludes that they do not comply with 157 CSR 2. **The Legislative Auditor recommends the DOH seek to amend either all lease agreements below FMRV to private entities or the Legislative Rule to allow it more flexibility when leasing properties for public purposes.**

### **Many of the Division of Highways' Current Property Leases Do Not Align With Current State Law or Best Practices. Deficiencies in Both the Management of These Leases and the Leases Themselves Could Expose the State to Potential Liability.**

The Legislative Auditor's review of DOH property leases also identified a myriad of other concerns with DOH's current property leases. Many of these issues involve noncompliance with West Virginia Code and/or the Legislative Rule governing DOH property leases.

### Excessive or Expired Lease Terms

The Legislative Auditor identified that 23 of the 86 property leases included in the audit sample contained a lease term in excess of 5 years. The terms for these 23 leases range from 10 years to as many as 99 years in one instance.

According to a legal opinion provided by Legislative Services, current statute restricts the DOH's ability to enter into lease agreements with terms exceeding five years to only those leases being used for utility accommodations. Legislative Services indicates:

*[I]t appears straightforward that there is a 5-year maximum term for leases. In that sense, it is not restricted to only 5 years; however, the DOH must update the lease term at least every 5 years. The only exception is for utility accommodation leases.*

The Legislative Auditor's review of these leases determined that none of the leases in the audit's sample are for the purposes of utility accommodations. **As such, the Legislative Auditor concludes that none of the 23 property leases identified as having lease terms in excess of five years are in compliance with the requirements of existing law.** As indicated by Legislative Services, the DOH is not strictly limited to leasing property for only five years, but it must structure

the lease terms such that they can be updated every five years, particularly as it relates to the FMRV and rental amounts for each lease agreement.

Importantly, it is the opinion of Legislative Services that this provision equally applies to DOH property leases with public bodies. Out of the 23 lease agreements with terms exceeding five years, 14 are leased to public bodies. Although the DOH is authorized to execute leases with public bodies for amounts below FMRV, existing state law provides only one exception—utility accommodation leases—to the requirement that lease terms be updated to reflect FMRV every five years.

The Legislative Auditor noted several examples of lease agreements between the DOH and public bodies wherein the DOH included language that facilitates the updating of lease terms every five years in compliance with state law. Figure 4 provides an example of this language in one of the DOH's current lease agreements with the West Virginia Division of Natural Resources.

**Figure 4.**

2. Term – This lease is for a term of five (5) years commencing on the first day of the month after the full execution of this agreement and the receipt of Lessee's first year's rent. Said receipt date shall be memorialized on the last page of this lease. Lessee shall have the option to renew this lease for additional successive five (5) year terms to be exercised by giving Lessor a written notice of intention to renew not less than ninety (90) days before the expiration of the term herein created or renewal term, except that, prior to the end of each term, the compensation herein provided shall be reviewed by the Lessor to determine whether said compensation reflects the then current economic conditions. If Lessor determines that said compensation does not reflect then current economic conditions, it shall notify Lessee, in which event, the rent shall be updated on the basis of the changed economic conditions. In the event the parties hereto fail to agree, this lease and all rights granted herein shall cease and terminate at the end of the then current five (5) year term. If Lessor shall determine, after such review, that economic conditions have not materially changed, the same compensation shall continue during the ensuing five (5) year period.

*Source:* Copy of DOH lease with the Division of Natural Resources obtained by the Legislative Auditor.

**Therefore, the Legislative Auditor recommends that the Division of Highways supplement or amend all property leases with terms in excess of five years, which are not for utility accommodations, to facilitate the updating of lease terms at least every five years.**

The Legislative Auditor also noted that 8 lease agreements in the audit sample were operating on lease agreements which have expired. **The Legislative Auditor recommends that the Division of Highways ensure that all current leased property is operating on a current and unexpired lease agreement.**

*Lease Agreements with No Appraisal Supporting Rental Amounts*

Similarly, the Legislative Auditor determined that 19 of the 86 sampled lease agreements did not contain a current, written appraisal documenting the DOH's determination of FMRV. Ten of the 19 leases included no appraisal documentation, including the seven lease agreements to private entities for rental amounts below FMRV and three lease agreements to companies wherein the leased purpose was for the mining of coal or extracting natural gas. In addition, for two of the 19 leases, the DOH was able to provide documentation of an appraisal, but the appraisal provided was outdated.

Law governing DOH's property leases indicates that leased properties must have rental amounts based on a written determination of FMRV unless they are to public bodies and for a public purpose. **The Legislative Auditor recommends that the Division of Highways ensure that all property leases have current written appraisals unless they meet the exemption stipulated in Legislative Rule.**

*Leases without Indemnification Clauses*

The Legislative Auditor identified nine lease agreements in the audit sample which did not include a clause indemnifying the State or otherwise clarifying that the lessee will hold the State harmless in claims that may arise as a result of the use of the leased property. Indemnification clauses (or hold harmless language) are an important and often required contractual term for contracts entered into by the State via its spending units and provide additional protections to the State against potential liability. **The Legislative Auditor recommends that the Division of Highways review all of its property leases to ensure that the appropriate indemnification language is present and supplement or amend existing lease agreements that lack such language to include it therein.**

*Leases for the Purpose of Natural Resource Extraction May Cost Counties Tax Revenues*

Within the audit sample, the Legislative Auditor notes four lease agreements wherein the Division of Highways leased property to a mining or oil and gas company. One of these property leases appears to only allow for access from one end of a property to another end of the same property through a state-owned parcel that divides the land. This lease does not appear to grant any mining rights to the state-owned parcel being leased.

The remaining three property leases, however, do have the specific purpose of authorizing the companies to mine or extract coal, oil, or natural gas from the state-owned land. Moreover, the Legislative Auditor notes that the lease terms for each of these properties constitute long-term leases between the DOH and the companies. While the leases contain an initial lease term ranging from 5 to 50 years, the three leases for mining or extraction purposes allow the companies to maintain these leases until such time as commercial activities on those leased properties cease.

The Legislative Auditor notes that the State does not pay property taxes levied by its counties for properties under the State's ownership. However, private companies, such as those

that mine coal or produce and extract oil and gas are required to pay these taxes on the properties they own. The Legislative Auditor questions whether these leasing arrangements, which allow companies to extract coal and natural gas from state-owned land until no longer economically viable, have the unintended consequence of allowing these companies to avoid paying property or other taxes that would normally be assessed on land owned by the companies and used for commercial purposes.

## **Conclusion**

The West Virginia Division of Highways is the owner of substantial landholdings throughout the State. In fact, as has been noted in both Suttle & Stalnaker's financial statements audits and prior Post Audit Division reports, the DOH itself is not able to fully account for every piece of property owned by it. While the DOH is currently the lessor for at least 378 pieces of property in West Virginia, because of its significant landholdings it has the potential to lease many more parcels of land at any time.

As such, it is the opinion of the Legislative Auditor that the DOH's management of its leased properties must ensure that property leases comply with all of the provisions of West Virginia Code and Legislative Rules, and that the DOH is taking every precaution to shield the State against unnecessary exposure to potential liability. While the Legislative Auditor reviewed only a sample of the DOH's 378 current lease agreements, the issues identified herein raises concerns that the State is not currently as protected from potential liability as it should be.

While it is not possible to quantify the potential liability risk posed by these issues, the Legislative Auditor concludes that it is prudent and wise for the State to avoid these risks altogether. The DOH can accomplish this by ensuring that all of its property leases comply with Code in that they have appropriate lease terms; consideration is based on a determination of fair market rental value; leases to public bodies clearly indicate that the public benefit derived from the leased property serves as consideration for the rights conveyed by the lease agreement; that each lease agreement contain clear language indemnifying or otherwise holding the State harmless in any claims; and that all lease agreements are operating on current and valid lease agreements.

## **Recommendations**

1. The Legislative Auditor recommends that the Division of Highways supplement or amend each of its property leases with public bodies to include language that indicates the public benefit provided through the lease agreement serves as consideration for the lease.
2. The Legislative Auditor recommends the Division of Highways formally define key terms and phrases such as "public body" and "public purpose" in its Legislative Rule and/or the Division of Highways' Right of Way Manual.
3. The Legislative Auditor recommends the Division of Highways seek to amend either all lease agreements below FMRV to private entities or the Legislative Rule to allow it more flexibility when leasing properties for public purposes.



4. The Legislative Auditor recommends that the Division of Highways supplement or amend all property leases with terms in excess of five years, which are not for utility accommodations, to facilitate the updating of lease terms at least every five years.
5. The Legislative Auditor recommends that the Division of Highways ensure that all current leased property is operating on a current and unexpired lease agreement.
6. The Legislative Auditor recommends that the Division of Highways ensure that all property leases have current written appraisals unless they meet the exemption stipulated in Legislative Rule.
7. The Legislative Auditor recommends that the Division of Highways review all of its property leases to ensure that the appropriate indemnification language is present and supplement or amend existing lease agreements that lack such language to include it therein.



# Appendix A

## WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

*Post Audit Division*

1900 Kanawha Blvd. East, Room W-329  
Charleston, WV 25305-0610  
(304) 347-4880



**Justin Robinson**  
**Director**

December 21, 2021

Mr. Jimmy Wriston, P.E., Cabinet Secretary  
West Virginia Department of Transportation  
State Capitol Complex  
Building 5  
Charleston, WV 25305

Dear Cabinet Secretary Wriston:

This is to transmit a draft copy of the Post Audit Division's report on the Division of Highways with respect to its property leases. This report is scheduled to be presented during the January interim meetings of the Post Audits Subcommittee. While the exact time and date of this meeting has not been determined, these interim meetings are scheduled to occur **January 9-11, 2022**. The meeting will be held in the Senate Finance Committee Room, Room 451-M, and we will inform you of the exact time and date once the information becomes available. It is expected that a representative of the agency be present at the meeting to respond to the report and answer any questions committee members may have during or after the meeting.

If you would like to schedule an exit conference to discuss the report or any concerns you may have with the report, please notify Terri Stowers, Executive Assistant, at 304-347-4880 by close of business **December 28, 2021**. In addition, if you wish to provide a written response to be included in the final report, we require this response by noon on **Wednesday January 5, 2022**, in order for it to be included in the final report. Thank you for your cooperation.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Robinson".

Justin Robinson

Enclosure



## **Appendix B**

### **Objective, Scope, and Methodology**

The Post Audit Division within the Office of the Legislative Auditor conducted this audit of the West Virginia Division of Highways pursuant to Chapter 5, Article 2, Section 5 of the *West Virginia Code*, as amended.

#### **Objectives**

The objective of this audit was:

*“Determine the extent to which the Division of Highways’ Right of Ways Division is ensuring that its property leases are properly executed and enforced. Specifically, the objective will evaluate whether:*

- 1. The Division of Highways Right of Ways Division is properly billing and collecting the documented consideration established in its leases and if collection is taking place within the correct timeframe.*
- 2. The Division of Highways Right of Ways Division is ensuring that lease rental amounts are established in accordance with the appraised fair market value of the property, and that such rental amounts are updated every five years, if applicable, based upon the existing market conditions (current appraised value); and*
- 3. The Division of Highways Right of Ways Division is executing all leases, including those below fair market rental value, in accordance with the requirements of W.Va. Code.”*

#### **Scope**

The scope of the audit will comprise all properties leased out by DOH Right of Ways Division during Fiscal Years 2019 and 2020. The scope will include sampling of leases (non-statistical). The scope will include documentation for the sampled leases, including copies of the fully executed lease document, documentation supporting the appraised fair market value of the properties under lease, and documentation demonstrating that payment has been collected in accordance with the lease agreements. The scope will not include a comprehensive review of all lease agreements executed by the DOH or its Right of Ways Division and will not assess whether the purpose of the leased properties is appropriate.

#### **Methodology**

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through interviews or email correspondence with various employees at state spending units. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the

respective agency's position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

The audit team relied on the work of specialist—lawyers with the Legislative Services Division of the Joint Committee on Government and Finance—who provided interpretations and guidance on all matter of law covered in the audit report.

The audit team employed the use of non-statistical sampling methodologies in order to evaluate compliance with W.Va. Code. The sample comprised 86 property leases, chosen using both random sampling and judgmental sampling procedures from a total population of 378 property leases that were confirmed as being valid and active by the Division of Highways.

Audit staff analyzed various source documents, such as the lease agreements, appraisals or other written determinations of fair market rental value, and documentation provided by the Division of Highways showing current payment status for the lease agreements.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



POST AUDITS SUBCOMMITTEE  
MEMBERS

SENATE MEMBERS	HOUSE MEMBERS
<i>President, Craig Blair</i>	<i>Roger Hanshaw, Speaker</i>
Mark Maynard	Brandon Steele
Stephen Baldwin	Chad Lovejoy



JOINT COMMITTEE ON GOVERNMENT AND FINANCE  
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR  
- POST AUDIT DIVISION -

---

Room 329 W, Building 1  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305  
Phone: (304) 347-4880