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Frank L. Blackwell
Executive Director
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Dear Director Blackwell:

You have asked for an Opinion of the Attorney General concerning an apparent conflict between the statutory powers of the School Building Authority of West Virginia (“the Authority”) and regulations that the Authority has promulgated. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advise upon questions of law . . . whenever required to do so, in writing, by . . . any . . . state officer, board, or commission, or the head of any state educational . . . institution” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

You have explained that in the wake of extensive flooding in June of 2016 that damaged multiple schools, then-Governor Tomblin tasked the Authority with administration of federal and state disaster relief funding, pursuant to state law. In response to that directive, the Authority applied for federal funding from the Federal Emergency Management Agency (“FEMA”). At issue in your request are federal funds intended to be used to relocate five schools in Kanawha and Nicholas Counties that suffered substantial flood damage, and which the United States Army Corps of Engineers have deemed to be “subject to repetitive damage” because they are located in a “designated floodway and/or floodplain.” You explain that the FEMA funding includes not only the funds needed for physical construction of the damaged school buildings, but also money to purchase real property to rebuild the schools “out of the floodway and flood plain, and out of harm’s way.”

You further noted that because the Authority is the “applicant” for this funding, the money will be transferred initially from FEMA to the West Virginia Department of Homeland Security and Emergency Management, then to the Authority. The Authority will, in turn, transfer the funds to the appropriate Local County Board of Education (“LCBOE”) pursuant to the Authority’s standard reimbursement requisition process.

Finally, you explained that the Authority has not historically used state funding to purchase real property, in an effort to maximize the funds available for school construction projects. Consistent with this policy, you have identified a number of Authority regulations that appear to prohibit expending or distributing money from the Authority for purposes of “site acquisition” for new schools.

Your letter raises the following legal question:

To what extent is the Authority’s statutory authorization to “administer all federal funds provided for the construction and major improvement of school facilities” constrained by regulations that prohibit the expenditure of Authority funds for the acquisition of real property?

For the reasons set forth below, we conclude that the regulations barring the use of Authority funds for site acquisition must yield to the Authority’s governing statutes, in which the Legislature has plainly authorized the Authority to purchase or facilitate the purchase of real property. Accordingly, a reviewing court would very likely conclude that the Authority has power to distribute the FEMA funds at issue to LCBOEs to facilitate the purchase of real property upon which to relocate damaged schools.

Discussion

There is no statutory impediment—direct or indirect—to the Authority acquiring real property for the construction of new schools, or to helping local entities acquire real property for this purpose. Consistent with the well-established rule that an unambiguous statute controls in any conflict with implementing agency regulations, the Authority very likely has authority to distribute the FEMA funds for purposes of acquiring real property even before any amendments to the Authority’s rules are finalized.

The Authority’s Statutory Powers

The Legislature has specifically declared its “intent . . . to empower the School Building Authority to facilitate and provide state funds and *to administer all federal funds provided for the construction and major improvement of school facilities* so as to meet the educational needs of the people of this state in an efficient and economical manner.” W. Va. Code § 18-9D-15(a) (emphasis added). By enabling the Authority to administer “all” federal funds intended for construction of school facilities, there is no question that the Authority is empowered to administer the FEMA funding you have identified. Further, the statute defines “[c]onstruction project” to mean a project “with a cost greater than one million dollars for the new construction, expansion or major renovation of facilities, buildings and structures for school purposes,” and expressly includes in

this definition “[t]he acquisition of land for current or future use in connection with the construction project.” W. Va. Code § 18-9D-2(3)(A) (emphasis added).

Beyond these general powers, the Authority’s statutorily enumerated powers confirm its authority to use federal funds to buy real property, or to reimburse an LCBOE for doing so.

Most relevant here, Section 18-9D-3(a)(13) provides that the Authority may “accept and expend any gift, grant, contribution, bequest or endowment of money . . . from the State of West Virginia or any other source for any or all of the purposes specified in this article or for any one or more of such purposes as may be specified in connection with the gift, grant, contribution, bequest or endowment” (emphases added). This broad grant of authority makes clear that the Authority may both accept and use grant money from the federal government (“any other source”). It also makes clear that the money may be used for “any” purpose “specified in connection with” the grant. As you explained in your letter, in light of the Army Corp of Engineers’ designation of certain schools as “subject to repetitive damage” because they were built in a “designated floodway and/or floodplain,” one of the express purposes of the FEMA funding is to rebuild schools outside of the floodway—a purpose which very likely requires acquiring new real property on which to rebuild them. Thus, if there were any doubt that purchasing real property is one of “the purposes specified in this article,” the fact that the FEMA funding is available to the Authority on the condition that the schools be rebuilt outside the floodplain would provide sufficient authorization for the Authority to use the funds for this purpose.

Finally, the Authority also has power to “do all things necessary or convenient to carry out [its] powers,” W. Va. Code § 18-9D-3(a)(20), including the power “[t]o make contracts and to execute all instruments necessary or convenient to effectuate the intent of and to exercise the powers granted to it by this article,” *id.* § 18-9D-3(a)(7). These “catch-all” provisions confirm that the Legislature intended the Authority to have broad discretion in the means available to carry out its powers. Indeed, even *without* such provisions a reviewing court would likely conclude that the Authority possesses “such powers as are reasonably and necessarily implied in the exercise of [its] duties in accomplishing the purposes of [its] [authorizing] act.” *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 727, 591 S.E.2d 277, 285 (2003).

We thus conclude that there is no statutory bar to the Authority providing LCBOEs with state or federal funds to acquire real property necessary for the relocation of flood damaged schools—and in fact that the Legislature expressly provided for the allocation of funds for such a purpose.*

* We take no position on whether other provisions in the statute, such as those regarding entering into agreements and administering projects of an LCBOE, may potentially affect the process by which the Authority reimburses an LCBOE or imposes additional requirements or limitations on the Authority’s generally broad powers in this context. *See, e.g.*, W. Va. Code § 18-9D-3(a)(16) (providing authority to “provide funds on an emergency basis to repair or replace property damaged by . . . flood,” where the funds are “made available in accordance with guidelines of the School Building Authority”); *id.* § 18-9D-3(a)(18). Consistent with the scope of your request, we conclude only that the Legislature unambiguously provided that federal funding may be used to acquire real property in appropriate circumstances.

The Authority's Contrary Regulations

Standing as a potential obstacle to the full exercise of the Authority's statutory power to acquire or facilitate the purchase of real property are regulations promulgated by the Authority (and subsequently approved by the Legislature) that prohibit using money available to the Authority to purchase real property. Specifically, one Authority regulation provides that "[Authority] Grant Funds may not be used for . . . [s]ite acquisition" W. Va. Code St. R. § 164-3-6.7.B. Similarly, W. Va. Code St. R. § 164-3-6.7.E provides that Authority funds may not be used for "legal fees associated with . . . property acquisition cost."

As you noted, these rules conflict with other Authority regulations that appear to contemplate using Authority funds to purchase real property—such as Recital A of the template for grant contracts between the Authority and an LCBOE, which affirms the Authority's statutory power "to provide available funds . . . to finance the costs of acquisition . . . of facilities for public school purposes in the State of West Virginia." W. Va. Code St. R. T. 164, Series 1, App. H. This apparent conflict within the Authority's own rules and policies would likely not be sufficient to defeat the concern posed by the more specific prohibition against using funds for site acquisition. *Cf. Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision applies."). Nevertheless, because the Authority's categorical prohibition on using funds for site acquisition conflicts with the authorizing statute, a court would likely find that regulation to be invalid.

"Although an agency may have power to promulgate rules and regulations, the rules and regulations must . . . conform to the laws enacted by the Legislature." *Anderson & Anderson Contractors, Inc. v. Latimer*, 162 W. Va. 803, 807-08, 257 S.E.2d 878, 881 (1979). Further, where "a statute contains clear and unambiguous language," an agency's rules "must faithfully reflect the intention of the Legislature" by giving "that language the same clear and unambiguous force and effect that the language commands in the statute." Syl. pt. 4, *Maikotter v. Univ. of W. Virginia Bd. of Trustees/W. Virginia Univ.*, 206 W. Va. 691, 692, 527 S.E.2d 802, 803 (1999); *see also, e.g., Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 727, 791 S.E.2d 168, 173 (2016) ("Of course, any interpretation of a statute by an agency [via regulation] must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation." (internal quotation marks omitted)).

The Supreme Court of Appeals has also held that these principles apply with full force where, instead of seeking to *expand* its powers, an agency has effectively *restricted* its statutory authority. Syl. pt. 3, *Rowe v. W. Va. Dep't of Corr.*, 170 W. Va. 230, 292 S.E.2d 650 (1982) ("an administrative agency may not issue a regulation which is inconsistent with, or which *alters or limits* its statutory authority" (emphasis added)); *Eastern Gas & Fuel Assocs. v. Hatcher*, 144 W. Va. 229, 237, 107 S.E.2d 618, 623 (1959) ("an administrative body may not issue a regulation which is out of harmony with, or which alters, or limits, the statute being administered" (citation omitted)).

Here, a reviewing court would likely find that the Authority's categorical bar on using its funds for site acquisition conflicts with, at minimum, the Legislature's directives in Section 18-

9D-15(a) regarding authority to administer federal funding for school construction projects, and Section 18-9D-3(a)(13) regarding authority to expend federal grant money for its intended purposes. When an agency's rules conflict with a statute, "[t]here is no question" that "the statute must control." *Repass v. Workers' Comp. Div.*, 212 W. Va. 86, 102, 569 S.E.2d 162, 178 (2002); see also *id.* at 103, 569 S.E.2d at 179 ("[t]he power of the Legislature is paramount when a court is faced with a conflict between a statute and a rule"). And because "[t]he judiciary is the final authority on issues of statutory construction," courts "are obliged to reject administrative constructions that are contrary to the clear language of a statute." *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 171, 564 S.E.2d 167, 168 (2002); see also *Hale v. W. Virginia Office of Ins. Com'r*, 228 W. Va. 781, 785, 724 S.E.2d 752, 756 (2012) ("To be valid, a regulation promulgated by an administrative agency must carry out the legislative intent of its governing statutes." (emphasis added)). Consistent with these principles, a court would likely give no legal effect to the Authority's regulations to the extent that they broadly prohibit using Authority funds for acquiring real property.

The fact that the Legislature approved the Authority's regulations would likely not change this outcome. The Supreme Court of Appeals "gives substantial deference to valid legislative rules, but that deference has bounds." *Harrison v. Comm'r, Div. of Motor Vehicles*, 226 W. Va. 23, 31, 697 S.E.2d 59, 67 (2010) (citing Syl. pt. 3, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995)). Importantly, "[a]lthough legislative rules complete the legislative process of review and enactment, the underlying subject of the enabling statute of each rule is not studied and deliberated by the legislative bodies through the rulemaking review process." *Id.* (citing W. Va. Code §§ 28A-3-1, to -18). This means that the ultimate touchstone for a rule's validity is whether it "submit[s] to the legislative intent expressed in the controlling or substantive statute which the rule is promulgated to implement." *Id.* (emphasis added). Thus, as our Supreme Court expressed in *Appalachian Power*, courts will set aside a "formally adopted legislative rule" where they find "clearcut evidence of an inconsistency between the rule and the authorizing statute." 195 W. Va. at 588, 466 S.E.2d at 239.

Although not certain in light of the "clearcut evidence" standard, we conclude that a reviewing court would very likely find the Authority's regulations invalid to the extent they purport to limit use of Authority funds—at any time, and under any circumstances—for site acquisition. As explained above, the Legislature has granted the Authority broad power to accept and expend funds from "any" source consistent with the purposes "specified in connection with" a particular grant. W. Va. Code § 18-9D-3(a)(13). And the Legislature has specifically "empower[ed]" the Authority "to administer all federal funds provided for construction . . . of school facilities," and defined "construction projects" to include "[t]he acquisition of land." *Id.* §§ 18-9D-15(a), 18-9D-2(3)(A). Although court may find that any regulations defining the manner in which the Authority fulfills these functions are permissible, it would also likely conclude that regulations barring use of Authority funds to acquire real property *at all* fail the "clearcut evidence" test.

We note, however, that in the cases discussed above the Supreme Court of Appeals typically addressed challenges to agency regulations brought by third-parties, in situations where the agencies defended their regulations and their interpretations of the authorizing statutes. We are

not aware of decisions analyzing circumstances where an agency acted pursuant to its statutory authority while also cognizant that contrary regulations were in effect. Nevertheless, our Supreme Court's ample precedent establishing that an unambiguous authorizing statute governs in the face of a conflicting regulation would likely apply here, and we are aware of no case suggesting that a court would apply a different rule where an agency discovers such a conflict before it acts.

In light of this potential uncertainty, as well as the relatively high "clearcut evidence" standard that a reviewing court would apply when determining if a conflict exists, we emphasize that it may be prudent for the Authority to begin proceedings to amend its regulations to the extent necessary to resolve the conflict. Indeed, amending the offending regulations now that subsequent analysis has revealed these concerns would be consistent with the Authority's duty to insure its regulations are consistent with the expressed intent of the Legislature as reflected in the statute that defines the Authority's powers. In the meantime, however, we conclude that the Authority very likely can rely on its statutory authority to use the FEMA funds to reimburse LCBOEs for costs related to acquiring real property.

Sincerely,



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