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Office of the Attorney General

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Honorable Gabrielle Mucciola
Monongalia County Prosecuting Attorney
75 High Street
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Dear Prosecutor Mucciola:

You have asked for an Opinion of the Attorney General on whether the Monongalia County Board of Education can lease school property to a for-profit business that it will then co-own. This Opinion is being issued under West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter explains that the Monongalia County Board of Education wants to take advantage of historic tax credits to renovate the Morgantown High School Auditorium. To do so, the Board would need to restructure how the building is managed. Though the Board would still own the building, it would create two entities: a for-profit management company and a non-profit foundation. The Board would enter a long-term lease with the management entity, which would in turn enter a sublease with the foundation. Then, an unspecified investor would apply for and receive the historic tax credits, which would provide funds to the management entity to make the repairs. To make sure this plan works, the Board would need to be a part owner of the management company.

You have asked the following question:

Whether the Board of Education has authority to lease county-owned property to a for-profit management entity, and whether the Board can hold an ownership position in the for-profit entity?

We conclude that, under the facts you have described, the Board's plans are impermissible under West Virginia Code Sections 18-5-7 and 18-5-13.

DISCUSSION

As the Board acknowledges, county "boards of education are 'created by statute with functions of a public nature.'" *Hartman v. Putnam*, No. 21-0765, 2022 WL 9925098, at *2 (W. Va. Oct. 17, 2022) (quoting syl. pt. 2, *Napier v. Lincoln Cnty. Bd. of Educ.*, 209 W. Va. 719, 551 S.E.2d 362 (2001)); *see also Pa. Lightning Rod Co. v. Bd. of Educ. of Cass Twp.*, 20 W. Va. 360, 360 (1882) ("Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute creating them."). A county board of education like Monongalia County thus depends on its enacting statute for its powers. And the Board "can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute." Syl. pt. 2, *Napier*, 209 W. Va. 719, 551 S.E.2d 362 (quoting syl. pt. 4, *Shinn v. Bd. of Educ.*, 39 W.Va. 497, 20 S.E. 604 (1894)); *see also City of Huntington v. Bacon*, 196 W. Va. 457, 470, 473 S.E.2d 743, 756 (1996) ("[A] board of education can only exercise power which is expressly conferred upon it by statute, and therefore, does not have a moral obligation to do anything," (cleaned up)).

When a statute does not grant the Board powers expressly, then the Board can presume to exercise implied authority only in certain limited circumstances. Implied authority "fairly aris[es] from necessary implication[s]" in the exercise of a board of education's express powers. Syl. pt. 7, *Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (quoting syl. pt. 4, *Shinn*, 39 W. Va. 497, 20 S.E. 604); *cf. Commonwealth, Pennsylvania Fish & Boat Comm'n v. Consol Energy, Inc.*, 233 W. Va. 409, 414, 758 S.E.2d 762, 767 (2014) (explaining that agencies created by statute hold only those implied powers that "may be necessary for the[] just and reasonable execution" of express powers). And if a statute is ambiguous when it comes to the powers it might confer on the board, then a court will find that the board does *not* have authority. *See* Syl. pt. 1, *McCallister v. Nelson,* 186 W. Va. 131, 411 S.E.2d 456 (1992).

We conclude that the Board does not have either express or implied statutory authority to either lease the auditorium or create or co-own a for-profit management entity.

Take the lease agreement first. Two statutory provisions give county boards of education authority over lease agreements. *First*, a county board of education may sell or lease school property that is no longer needed for school purposes. W. Va. Code § 18-5-7. *Second*, a board has authority to control and manage "all of the schools and school interests for all school activities and upon all school property owned or leased by the county." *Id.* § 18-5-13. (Relatedly, the Board must also "provide … [f]or the repair and good order of the school … buildings." *Id.*)

West Virginia Code Section 18-5-7 does not give the Board the authority to enter into the proposed lease agreement here. That statute sets out the procedure for leasing school property: If a "county board determines that any school property is no longer needed for school purposes," then it may "offer the property for lease." *Id.* § 18-5-7(e). The Board may also lease out the building if it is "for a public use to the State of West Virginia, or its political subdivisions, including county commissions." *Id.* § 18-5-7(f). So the Board may lease property if it no longer needs it, or if it leases the building to the State or its political subdivisions.

But under the facts you have described, neither subsection of Section 18-5-7 applies here—the Board still intends to use the auditorium for school use, and it would be leasing it to a private company. Thus, the Board's proposal would exceed its express authority under Section 18-5-7. We find no implied authority deriving from the statute, either. We think it important that the Legislature was unmistakably clear about what types of leases it wanted to permit—and the sort of lease the Board now wants to enter is noticeably absent. "[I]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies." *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 334, 873 S.E.2d 859, 865 (2022); *cf. Dooley v. Bd. of Educ. of Cabin Creek Dist.*, 80 W. Va. 648, 93 S.E. 766, 768 (1917) (finding that a statute's specificity about the ways in which school property could be disposed precluded other, non-enumerated avenues of sale or disposition).

We reach the same conclusion under West Virginia Code § 18-5-13, which sets out the general powers that boards of education may exercise. As relevant here, boards may "[c]ontrol and manage all of the schools and school interests for all school activities and upon all school property owned or leased by the county" and likewise maintain buildings like the auditorium here. W. Va. Code § 18-5-13. But nothing in this language explicitly gives the Board the ability to lease the auditorium to a for-profit company. And we further conclude that the language does not unambiguously greenlight this sort of lease by implication because this kind of lease arrangement—a lease of a still-operating school facility to a for-profit entity for the express purpose of leasing back the facility to a non-profit entity—is not a normal and necessary aspect of managing and maintaining school buildings. What's more, because Section 18-5-7 already addresses the limited circumstances that the Board may lease school property, Section 18-5-13 shouldn't be read to expand that authority. *See Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670, 815 S.E.2d 474, 481 (2018) ("[T]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.").

Cases from the Supreme Court of Appeals confirm our understanding of these two statutes, as the Court has hewed closely to the enabling statutes' language when deciding the powers of a county board of education to lease land. *See Herald v. Bd. of Educ.*, 65 W. Va. 765, 65 S.E. 102 (1909). In *Herald*, the Court rejected a county school board's lease of a school lot for oil and gas, finding that a board of education "cannot lease [land] for money making, because the statute provides for the accomplishment of its object by taxation, not by negotiation in the business world." *Id.* at 105. To allow the board to lease for profit, the Court said, would provide limitless powers to a board of education. *Id.* at 106 ("If such boards may wield such powers, where is the limit, and how far may it not frustrate the whole purpose of the ownership of the board?"). The Court later upheld a similar plan, however, after the legislature revised the statute because "[t]hat power has since been conferred by the legislature." *Garrett v. Bd. of Educ. of Chapmansville Dist.*, 109 W. Va. 714, 156 S.E. 115, 116 (1930). Thus, the Court recognizes that a school board's power goes only as far as the statutory language.

This Office addressed similar questions in similar fashion in two earlier opinion letters. In a 2018 opinion letter, we explained that a county commission lacks the authority to create a

"lease designed to allow a private company to conduct for-profit business activities" on county-owned property because it would exceed "the Commission's express powers." 35 W. Va. Att'y Gen. Op. 24, 2018 WL 3390019 (June 6, 2018). This concern arises "even as a joint lessee." 35 W. Va. Att'y Gen. Op. 24. This Opinion was consistent with another opinion from 2014, in which we concluded that a county commission could not lease or rent the third floor of a county-owned building to a private individual for use as a private residence. 31 W. Va. Att'y Gen. Op. 20, 2014 WL 1875639 (May 6, 2014). Though we noted county commissions may lease property involving a private company provided it is for a "public purpose," that power exists only because a statutory provision gives the county commission express authority. W. Va. Code § 7-1-3hh. It also makes sense for county commissions to have this authority—and not boards of education—because county commissions' "powers are wider than those of a board of education." *Herald*, 65 W. Va. 765, 65 S.E. 102, 105 (1909).

So consistent with the statutory text, case law, and the 2018 and 2014 Opinion Letters, we conclude that a county board of education lacks the authority to lease property still being used for school purposes to a for-profit business.

Even aside from the lease agreement, the Board also lacks the authority to create and co-own a legally distinct for-profit company. Nothing in West Virginia Code Sections 18-5-7, 18-5-13, or any other section that we have reviewed says that a board of education could co-own a for-profit entity. And as explained above, we think this arrangement cannot be seen as an exercise of implied authority tied to one of the Board's express powers. (The Board has not yet identified any such source, either.)

Here again, precedent from the Supreme Court of Appeals forecloses the Board's ability to do so, too. *Napier*, 209 W. Va. 719, 551 S.E.2d 362. In *Napier*, the Court analyzed a Lincoln County Board of Education program called "West Virginia Dreams," a collaborative effort between the board of education and a non-profit community organization to provide after-school and summer programs. *Id.* at 720-21, 551 S.E.2d at 363-64. The Court considered whether this venture was subject to the statutory grievance process for state and local educational employees. *Id.* at 725, 551 S.E.2d at 368. In holding that the Grievance Board had jurisdiction to hear the grievance, the Court recognized that the county board of education lacked "the power under West Virginia law to form such an entity in affiliation with another organization." *Id.* at 724, 551 S.E.2d at 367. No "direct or implied authority permitt[ed]" the board of education's actions. *Id.* So, the board of education could not create a separate entity or shield itself from the "statutory grievance process." *Id.* at 725, 554 S.E.2d at 368. Although *Napier* involved issues of jurisdiction, it again shows that the Supreme Court construes the statutory text that empowers the board of education narrowly in a closely analogous situation.

Napier also shows that, even if the Board could act as a co-owner in this venture, it may not allow the Board to take advantage of the sought-after tax credits. The *Napier* Court analyzed who controlled West Virginia Dreams, finding that the board of education still controlled the program by "retain[ing] the final say in all matters related to the project"; moreover, a "majority of the Management Team [wa]s composed of employees of the Board of Education." *Napier*, 209 W. Va. at 725, 551 S.E.2d at 368. The board of education's control meant that the program

did not "stand apart to any material degree from the Board of Education" and would be treated as a subordinate organization—not a "fiscal agent for another entity." *Id.* Although we are presented with only limited facts about the degree of control that the Monongalia County Board of Education would exercise over this entity, the same might be true here. At least based on the facts we know, it appears the Board would likely exert substantial control over the for-profit company to ensure that tax credits are received and spent appropriately. So, courts could still treat the management company as part of the Board—making it ineligible for the tax credits.

But that eligibility question only matters if the Board had the authority to enter into a lease with a for-profit business of its own making—something the statutory provisions, case law, and previous Opinions of the Attorney General say cannot happen.

* * * *

However admirable its ultimate objectives might be, the Board has limited powers to lease its property. It can lease its property if it no longer needs it, or it can lease it to the State of West Virginia or its political subdivisions. But it cannot lease its property to a for-profit company, let alone co-own the for-profit business.

Sincerely,

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