



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

March 31, 2017

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The Honorable James W. Davis, Jr.
Prosecuting Attorney
Office of the Hancock County Prosecuting Attorney
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Dear Prosecutor Davis:

You have asked for an Opinion of the Attorney General regarding Hancock County's use of funds left over from "special excess lev[ies]" approved by the voters of Hancock County in May 2008 and May 2012. This Opinion is being issued pursuant to 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." 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.

Your correspondence raises the following legal questions, which are addressed in turn below:

- (1) Does the Hancock County Animal Shelter Foundation have the right to use or claim any of the remaining funds from the 2008 and 2012 special excess levies?*
- (2) Does the County Commission have the authority to use the funds remaining from the special excess levies for its county animal shelter?*

Background

Your correspondence concerns two special excess levies related to the Hancock County Animal Shelter ("Shelter"), which is owned by the Hancock County Commission ("County Commission") but was until recently run by the Hancock County Animal Shelter Foundation ("Foundation") under a contract with the County Commission. Through the Shelter, the County Commission complies with its duties under West Virginia Code § 19-20-6 regarding the control, registration, and care and impoundment of stray or unwanted animals. Beginning on or around August 7, 1997, the County Commission entered into a contract with the Foundation—a private,

non-profit corporation¹—to run and manage the Shelter. Authorized specifically by West Virginia Code § 19–20–6a, the contract appropriated \$80,000 annually to the Foundation to operate the Shelter. You report that in practice, the Commission annually appropriated far more to the Foundation from its own funds—approximately \$220,000 in 2008-09; \$175,000 in 2009-10; \$175,000 in 2010-11; \$175,000 in 2011-12; \$175,000 in 2012-13; \$175,000 in 2013-14; \$175,000 in 2014-15; and \$144,000 in 2015-16.

In March 2008, the County Commission determined that its annual appropriations would not sufficiently cover the costs associated with running the Shelter and proposed a “special excess levy” to provide additional funds. The County submitted to vote at Hancock County’s regular primary election in May 2008 a special excess levy of \$100,000 annually, beginning in fiscal year 2009, for “the purpose of providing” “for the financial support of the Hancock County Animal Shelter Foundation.” In an order giving notice to the voters, the County Commission explained that the levy was necessary because “the maximum levies for current expenses . . . will not provide sufficient funds for the payment of current expenses of the County Commission of Hancock County, including expenditures for the purpose hereinafter set forth.” The levy capped the projected tax collection at \$100,000 per year for the fiscal years 2009, 2010, and 2011. Any monies collected beyond \$100,000 each year (due to increases in assessed value of the taxed properties) would “be transferred to the general fund of [Hancock] County for expenditure by said County for recreational purposes only.” The voters approved the levy, which ran for three years and concluded on June 30, 2012 (the end of fiscal year 2011).

In 2012, the County Commission proposed a “renewal [special excess] levy” to provide additional funds, as the County Commission had done in 2008. The County Commission submitted to vote at Hancock County’s regular primary election in May 2012 the renewal levy ballot to assess additional taxes on property in Hancock County for the fiscal years 2012, 2013, 2014, and 2015 “for the purpose of providing” “for the financial support of the Hancock County Animal Shelter Foundation.” In an order giving notice to the voters, the County Commission explained that the levy was necessary because “the maximum levies for current expenses . . . will not provide sufficient funds for the payment of current expenses of the County Commission of Hancock County, including expenditures for the purpose hereinafter set forth.” The renewal levy once again capped the projected tax collection at \$100,000 per year but, unlike the previously raised levy, placed specific restrictions on the purposes for which the raised monies could be used. Specifically the notice to the voters explained that \$80,000 per year (80%) would be for “operational costs, including animal care needs and shelter supplies” and \$20,000 (20%) would be used for “renovations to the current shelter.” Any monies collected beyond \$100,000 each year (due to increases in assessed value of the taxed properties) would still “be transferred to the general fund of [Hancock] County for expenditure by said County for recreational purposes

¹ It appears that although the Foundation is a registered 501(c)(3) organization, the Foundation allowed its registration as a charity to lapse with the West Virginia Secretary of State. The Foundation submitted forms to renew its delinquent registration; however, the Secretary of State rejected those forms, and sent a cease and desist letter instructing the Foundation to change its name to avoid confusion with the Shelter itself, and inviting the Foundation to resubmit the forms with a corrected name.. The Foundation has not done so as of the release of this Opinion.

Hon. James W. Davis, Jr.

March 31, 2017

Page 3

only.” The taxpayers approved the renewal levy, which ran for four years and concluded on June 30, 2016 (the end of fiscal year 2015).

According to your correspondence, the County Commission has always maintained exclusive control over the funds from both levies. This included collecting the funds, storing them in a County Commission bank account, and meeting monthly to review the Foundation’s requests for distributions of monies from the levies and for reimbursement of expenses. “Upon approval” of requisitions and receipts provided by the Foundation, the County Commission would pay the Foundation from either the money collected by the levies or the County Commission’s regular monthly stipend to the Foundation. On occasion, the Commission would pay for expenses directly, usually for infrastructure repairs and improvements. The Foundation did not have direct access to any monies.

The focus of your Opinion request is a dispute over remaining funds from both the original levy and the renewal levy that has arisen following the County Commission’s recent decision to terminate its agreement with the Foundation. In March 2016, the County Commission gave the Foundation notice and the contract terminated as of midnight on July 1, 2016. Control and operation of the Shelter has returned to the County Commission, and approximately \$300,000 from the levies—approximately \$187,944 from the original levy and \$112,056 from the renewal levy—remains in the County Commission’s bank account. According to your estimate, the expenditures from the levies amounted to: \$75,415.70 in 2009-10; \$22,871.07 in 2010-11; \$13,839.46 in 2011-12; \$44,492.24 in 2012-13; \$62,891.79 in 2013-14; \$55,586.00 in 2014-15; and \$123,631.90 in 2015-16—sums that were all well below the total collections of the levies. You represent that the Foundation has been fully reimbursed for all services it provided under contract prior to termination.

The County Commission and the Foundation disagree over which entity may now claim these remaining funds from the levies. The Foundation believes that, because the levies instructed that the funds were “to provide financial support for the Hancock County Animal Shelter Foundation,” it may take funds from the levies to open its own, private animal shelter facility. In further support, the Foundation claims to have received (but has not produced) an email from either a present or a former County Commissioner, stating the Commissioner’s belief that the remaining levy money belongs to the Foundation. In contrast, the County Commission believes that it controls the funds and may continue to apply them to operate the Shelter.

Discussion

Question One: Does The Hancock County Animal Shelter Foundation Have The Right To Use Or Claim Any Of The Remaining Funds From The Special Excess Levies?

It is well-settled that a state may not levy taxes for private purposes. The U.S. Supreme Court has explained that “[t]he due process of law clause [in the U.S. Constitution] contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the right to impose taxes for merely private purposes.” *Green v. Frazier*, 253 U.S. 233, 238 (1920). Similarly, our Supreme Court of Appeals

has said that “[t]he Legislature is without power to levy taxes or appropriate public revenues for purely private purposes.” Syl. Pt. 1, *State ex rel. Adkins v. Sims*, 130 W. Va. 645, 46 S.E.2d 81 (1947); see also *Adkins*, 130 W. Va. at 655, 46 S.E.2d at 86; see also *Lingamfelter v. Brown*, 132 W. Va. 566, 573, 52 S.E.2d 687, 691 (1949) (principle that “tax may be levied only for a public purpose” is “implicit in our form of government”). Taxes may only be levied for a “public purpose,” which the Supreme Court of Appeals has said to be “synonymous” with “government purpose.” *Lingamfelter*, 132 W. Va. at 575, 52 S.E.2d at 692.

This prohibition applies not only to the Legislature, but also to municipalities. “Municipalities derive all their power as well as their existence from the Legislature,” and thus their powers of taxation may never exceed those of the Legislature itself. *Booten v. Pinson*, 77 W. Va. 412, 89 S.E. 985, 989 (1915). And because the Legislature lacks the ability to levy taxes for a private purpose, municipalities must likewise lack that power. See Syl. Pt. 1, *Adkins*, 130 W. Va. 645, 46 S.E.2d 81.

To be sure, the restriction upon taxation for private purposes does not absolutely prohibit the payment of taxpayer funds to private persons. In certain circumstances, the “appropriation [of taxpayer funds] to a private person” may be for or considered a permissible public purpose. Syl. Pt. 1, *Adkins*, 130 W. Va. 645, 46 S.E.2d 81. Relevant here, the Legislature has expressly provided that a county commission has the authority to “contract with or reimburse any private incorporated society or association”—like the Foundation—“for the care, maintenance, control or destruction of dogs and cats.” W. Va. Code § 19–20–6a; see also 58 W. Va. Op. Att’y Gen. 207, at *4 (Mar. 18, 1980) (“Code 19–20–6a leaves no doubt that the Marion County Commission may contract with the Humane Society to run an animal shelter.”).

We conclude that the Hancock County Animal Shelter Foundation may not use or claim any of the remaining funds from the levies. Although the County Commission may have been permitted by Section 19–20–6a to support the Foundation’s work while the Foundation was under contract and operating the Shelter, the Commission cannot do so now.² As you explain, the contract between the Commission and the Foundation terminated on July 1, 2016. The

² Though the West Virginia Supreme Court of Appeals has not addressed the merits of this issue, the Supreme Court of Appeals has considered claims involving one of the levies at issue in this letter. See *Cline v. Hancock Cnty. Comm’n*, No. 12-0799, 2013 WL 3388232 (W. Va. July 8, 2013) [*Cline I*]; *Cline v. Cnty. Comm’n of Hancock*, No. 12-1418, 2013 WL 5525740 (W. Va. Oct. 4, 2013) [*Cline II*]. In *Cline I*, Cline challenged a similar levy, which was brought to vote in 2011. *Cline I*, 2013 WL 3388232, at *1. The 2011 levy proposed “to provide financial support for the Hancock County Animal Shelter Foundation . . . for the fiscal years beginning July 1, 2012, July 1, 2013, and July 1, 2014.” *Id.* Cline alleged that the County Commission “lacked the authority to provide direct financial support to a private organization such as the Foundation” and also that the “Foundation’s goal of being a ‘low-kill’ animal shelter went beyond [the County Commission’s] statutory obligations to stray dogs and cats.” *Id.* When the proposed 2011 levy failed, the circuit court found Cline’s grievance to be moot and dismissed the case. *Id.* After the voters approved the May 2012 levy at issue in this letter, Cline asked the circuit court to reopen his case, arguing that the controversy was renewed by the approval of the May 2012 levy. *Id.* at *1–2. The circuit court declined to do so. *Id.* at *2. The Supreme Court of Appeals affirmed the circuit court’s dismissal of the case as moot. *Id.* In *Cline II*, Cline again attempted to challenge the May 2012 levy by filing a petition for writ of supersedeas. *Cline II*, 2013 WL 5525740, at *1. The circuit court denied the petition for failure to state a claim and denied a request from Cline to reconsider and amend its order. *Id.* at *2. Cline appealed, and the Supreme Court of Appeals affirmed. *Id.* at *3.

Foundation now seeks to use the remaining levy money to open and operate a *private* shelter. That is not permissible as a matter of both state and federal law.

We need not answer whether the terms of the levies or the email of a single County Commissioner contemplate that all of the money from the levies belongs exclusively to the Foundation for its use as it sees fit. It does not matter if either or both is true. Regardless, the prohibition on levying taxes for a private purpose plainly bars the distribution of funds from the levies to the Foundation for any work it is doing in a purely private capacity.

Question Two: Does The County Commission Have The Authority To Use The Funds From The Levies For Its County Animal Shelter?

The answer to this question begins with the purposes for which the levies were raised. West Virginia Code § 11–8–25 states: “Except as otherwise provided in this article, boards or officers expending funds derived from the levying of taxes shall expend the funds only for the purposes for which they were raised.” W. Va. Code § 11–8–25; *see also* Syl. Pt. 1, in part, *Thomas v. Bd. of Educ., McDowell Cnty.*, 167 W. Va. 911, 280 S.E.2d 816 (1981) [*Thomas II*]. “The general rule is that the purpose for which funds were raised at a special election levy is determined by the proposal approved by the voters at the polls.” *Thomas v. Bd. of Educ., McDowell Cnty.*, 164 W. Va. 84, 88–89, 261 S.E.2d 66, 69 (1979) [*Thomas I*] (citing *Haws v. Cnty. Court of Wayne Cnty.*, 86 W. Va. 650, 104 S.E. 119 (1920); *Lawson v. Kanawha Cnty. Court*, 80 W. Va. 612, 92 S.E. 786 (1917); *Harner v. Monongalia Cnty. Court*, 80 W. Va. 626, 92 S.E. 781 (1917); *Brown v. Preston Cnty. Court*, 78 W. Va. 644, 90 S.E. 166 (1916)). Legal action may be brought when tax money is not properly applied to its purposes, *see id.*, or is spent in any “unauthorized manner,” W. Va. Code § 11–8–26.

Given that one express purpose of the levies—to provide for the financial support of the Foundation—can no longer be executed, the disposal of the remaining funds from the levies depends upon whether a court would sever the portions of the levies that require funds to be provided for the Foundation. Generally speaking, when one provision of a law is void, a court must examine if the void aspect can be severed from the whole because “a statute may be constitutional in one part and unconstitutional in another.” *State v. Flinn*, 158 W. Va. 111, 130, 208 S.E.2d 538, 549 (1974). Severability depends on an examination of “legislative intent,” the “most critical aspect” of which “involves the degree of dependency of statutes.” *Louk v. Cormier*, 218 W. Va. 81, 96–97, 622 S.E.2d 788, 803–04 (2005) (quotations omitted). Thus, “[w]here the valid and the invalid provisions of a statute are so connected and interdependent in subject matter, meaning, or purpose as to preclude the belief, presumption or conclusion that the Legislature would have passed the one without the other, the whole statute will be declared invalid.” Syl. Pt. 9, *Robertson v. Hatcher*, 148 W. Va. 239, 135 S.E.2d 675 (1964).

For special levies, in particular, the Supreme Court of Appeals has placed great weight on the purpose identified in the levy, stressing that collected funds must be used solely for the purpose for which a special levy was created. “Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not

diverted to any other purpose or transferred from such authorized fund to any other fund.” Syl. Pt. 7, *McGraw v. Hansbarger*, 171 W. Va. 758, 301 S.E.2d 848 (1983); *see also Hairston v. Lipscomb*, 178 W. Va. 343, 347 n.7, 359 S.E.2d 571, 575 n.7 (1987). More specifically, “[w]hen a levy election is held to raise money for a *specific public purpose*, the money *must* be applied *toward that purpose*.” *Thomas II*, 167 W. Va. at 918, 280 S.E.2d at 820 (emphases added).

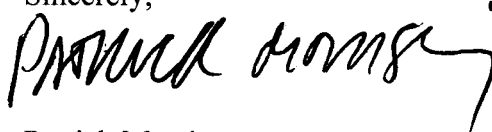
We believe that a court applying these principles to this matter would conclude that the requirement in both levies to provide financial support to the Foundation cannot be severed from the levies and, therefore, that the funds collected for that purpose cannot be used for a different purpose. In approving the levies, the voters approved the collection of \$100,000 a year for the clear and sole purpose of providing financial support to the “Foundation.” The levies made no provision for the County’s use of the funds in the event that the Foundation ceased to run the Shelter. Nor can it be known that the voters would have approved either levy if the funds would be for the County’s (or any other entity’s) operation of the shelter and not the Foundation’s. Voters could reasonably perceive a specific range of services offered by the Foundation’s operation of the Shelter—such as the “Foundation’s goal of being a ‘low-kill’ animal shelter,” *Cline I*, 2013 WL 3388232, at *1—that another entity would not provide. With respect to the additional instructions in the renewal levy, we do not believe that a court would read the instructions that 80% of the monies be used for operational costs, and 20% be used for renovations, to alter the levy’s stated purpose of providing funding to support the “Foundation.” These are simply restrictions designating how the Foundation was to use the funds.

As a result, we further believe that a court properly confronted with the question would likely conclude that funds remaining from both levies, which were collected specifically to support the Foundation should—as a general rule—be returned to the taxpayers. When a levy or tax is unconstitutional, due process requires that the government provide the taxpayers “meaningful backward-looking relief.” *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regulation of Florida*, 496 U.S. 18, 31 (1990). The particular remedies and procedures that may be applicable here are beyond the scope of this Opinion.

We do not believe, however, that a court would reach this same conclusion regarding any funds collected under the levies in excess of \$100,000 per year. The levies expressly gave notice that such funds (resulting from increases in the assessed values of taxed properties) would be collected not for the support of the Foundation, but rather would be transferred to the general fund of Hancock County to be used only for recreational purposes. The voters specifically approved the collection and use of those limited funds for that separate public purpose, and the termination of the relationship between Hancock County and the Foundation does not affect the lawfulness of that part of the levies.

Hon. James W. Davis, Jr.
March 31, 2017
Page 7

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Morrissey". The signature is written in a cursive, somewhat stylized font with a large initial "P" and a long, sweeping tail.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Katlyn Miller
Assistant Attorney General