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The Honorable Charles O. Lorensen
Secretary of Tax and Revenue
State Capitol
Building 1, Room 300
Charleston, West Virginia 25305

The Honorable Wesley Martin
Superintendent
Logan County Schools
Box 477
671 East Stratton Street
Logan, West Virginia 25601

Dear Sirs:

We are in receipt of your individual letters concerning the Logan County Board of Education's Special Levy of November 8, 1983. Since both letters essentially ask the same questions concerning the Special Levy, we will answer both letters through the necessary convenience of one response. In so doing, we may answer some questions that stem from one letter and not the other. However, we believe that such answers will benefit both. Importantly, we must make it clear that our understanding of the facts is derived solely from both letters. Accordingly, we have attached a copy of each letter to this response.

Formalities aside, it is our understanding that your letters ask one central question and three related subsidiary questions. The central question is:

Must the funds from a special levy be expended for all of the requirements of the special levy call, even though additional funds from other sources have been made available to fulfill some of the objectives of the levy?

The subsidiary questions are:

(1) Can the additional funds, which are received from a federal or state program, satisfy both the objectives of the program and the levy?

(2) If special levy funds must fulfill the objectives of the levy, then must they be expended during the specified period of the levy or may they be expended at a future date? Relatedly, if the funds can be expended into the future, how far in the future can they be expended for purposes set forth in the levy?

(3) Was the action of the Logan County School Board (which shall be detailed below), in relation to its Special Levy, proper under Chapter 11, Article 8 of the West Virginia Code?

In answering these questions we shall first summarize our understanding of the material facts and give a general review of the relevant law and its application to those facts. Then we shall specifically answer the questions outlined above.

On November 8, 1983, the Logan County Board of Education (hereinafter "Board") was authorized by a county-wide election to impose an Excess Levy for five fiscal years beginning June 30, 1985 and continuing through June 30, 1989. Paraphrasing Secretary Lorensen's letter, the levy was for the following purposes:

(1) The continuation and increase of present salary supplements; payment of salaries for persons not fully funded by the state school support program; and the payment of fixed charges associated with all of the above for all supervisory personnel, principals, and teaching personnel in the approximate amount of \$1,909,540 annually;

(2) The continuation and increase of present salary supplements; payment of salaries for persons not fully funded by the state school support program; and the payment of fixed charges associated with the above for all school service personnel, in the approximate amount of \$446,800 annually;

(3) The continuation of the program providing free textbooks for all students in the Logan County School District in the approximate amount of \$200,000 annually;

(4) The continuation and improvement of a program providing basic instructional supplies and equipment for all students in the Logan County School District in the approximate amount of \$300,000 annually;

(5) The continuation of a program providing additional instructional supplies, equipment, and services for physically and mentally handicapped children in the Logan County School District in the approximate amount of \$64,278 annually;

(6) The implementation and continuation of a program providing financial support to the following community services in the total approximate amount of \$122,000 annually: Logan County Public Recreation and Playgrounds Board, public libraries, Logan County Health Department, and Logan County 4-H Clubs;

(7) That after the Board has funded the purposes outlined above, then provide authorization for the Board to expend any excess that may have accumulated in any fiscal year covered by the levy, or which may be available at the end of the levy, for use on current expenses and other public purposes.

At approximately the same time the levy was approved in Logan County, the State of West Virginia began instituting the "Step 7" Program which furnished funding to county schools for a variety of needs, including textbooks and supplies. Essentially, therefore, the "Step 7" Program provided assistance for the needs denominated as numbers 3, 4 and 5 in the Logan County Special Levy.¹

Subsequent to the approval of the Special Levy, Superintendent Martin states that the Board discovered that it was unable to meet Special Levy objectives 1 and 2 because of unforeseen increases in the cost of school personnel and further cutbacks in the Board's budget. As a result, the Board, in order to avoid operating under a deficit in contravention of W. Va. Code § 11-8-26, transferred Special Levy revenues that had been earmarked for items 3 through 5 to meet the needs of levy items 1 and 2. This was undertaken and completed during the five-year levy period.² Notwithstanding this shifted allocation, Superintendent Martin demonstrated in his letter that the needs provided for in Levy items 3 through 5 were accomplished and exceeded by the "step 7" program assistance (See "Exhibit A" of his letter).

In 1987, the State Tax Department conducted an audit of the Board and discovered the transfers noted above. However, due to

¹The fact that the collateral source herein was other public funds is not determinative here. Our conclusions would remain the same if the source of the collateral funds had been, for example, a generous benefactor who made a large gift to the Board conditioned upon its use to provide supplies and equipment for the children of the county.

²It must be strongly noted here that there is no indication or intimation from the materials provided that the School Board expended the Special Levy funds on objectives, needs, or any other expenses outside of those objectives delineated in the Levy. Indeed, if that were the case, then our discussion concerning the application of the relevant law would be substantially different.

a large backlog at the Tax Department, this matter could not be addressed until the Special Levy had ended.

We begin our discussion of your questions with the broad rule imposed by statute that special levy funds must be expended solely for the purposes approved by the voters. W. Va. Code § 11-8-25; See Bane v. Board of Education of Monongalia City, ___ W. Va. ___, 364 S.E.2d 540 (1987); Maynard v. Board of Education Wayne County, ___ W. Va. ___, 357 S.E.2d 246 (1987); Thomas v. Board of Education of McDowell County, 167 W. Va. 911, 280 S.E.2d 816 (1981) ("Thomas II"); Thomas v. Board of Education of McDowell County, 164 W. Va. 84, 261 S.E.2d 66 (1979), ("Thomas I"); 59 Ops. Att'y Gen. 161 (February 4, 1982). There is no question, therefore, that any expenditure of funds outside the specified purposes of a levy is improper and in those instances where the courts have found such expenditures, they have not hesitated to declare them improper. In the case of Jarrell v. Board of Education of Raleigh County, 131 W. Va. 702, 50 S.E.2d 442 (1948), the West Virginia Supreme Court examined the predecessor statute to our W. Va. Code § 11-8-25 and determined that the expenditure of special levy monies for additional projects not specified in the funding levy constituted an unlawful diversion of funds from the purposes for which they were authorized by the voters. In that case, the voters of Raleigh County had approved special levies for the purpose of completing certain specified building projects in the county. The defendant, however, determined that due to unexpected and extraordinary increases in the cost of labor and material which occurred subsequent to the passage of the levies, the levy monies would be insufficient to accomplish the specified projects. The defendant then chose to use a portion of the levy funds for projects not specified in the levies but which could be completed with the available funds. As salutary as the defendant's intentions were, the Court nonetheless held the actions improper because the expenditures were not authorized by the terms of the levies. With regard to the questions we now address, there is no allegation that any levy funds were spent for purposes other than a specified use enumerated in the levy; rather, we are faced with the more unique issue of whether a board is required to expend levy monies for purposes enumerated in a levy even though funding for the purposes has subsequently been met through other funding sources.

As we have already noted, a board cannot expend levy funds for uses beyond the scope of the express purposes of the levy. Therefore the relevant inquiry is to determine the "purposes" for which the funds were raised. The purposes for which the funds were raised is determined by the particular proposal approved by the voters. It is necessary, therefore, to examine the specific language of a levy proposal in order to ascertain "the meaning given to it by the voters of the county who, by their approval of the special levy, consent to be taxed more heavily to provide the necessary funds." Syl. Pt. 1, Thomas I, supra.

In the Thomas cases the issue involved interpreting the intentions of the voters of McDowell County when, in 1973, they passed a levy that provided, among other things, a provision:

To continue the supplement to the salary or wages of each regularly employed full-time non-teaching employee in the amount of fifty-five dollars (\$55.00) per month plus the required social security payments, being an approximate amount of \$170,000 per year, or an approximate total for five years of \$850,000.

Our Supreme Court found that the intent of the voters was to provide a specific supplement to the state minimum salary for school employees and therefore required that even though the minimum wages of non-teaching employees had subsequently been raised, the employees were entitled to the additional supplement intended by the voters.

In contrast is the holding in the more recent case of Bane v. Board of Education of Monongalia County, supra, which also dealt with supplements to the salaries of non-teaching personnel. The language of the levy in question was of a more general nature than the language invoked in the Thomas cases. The Court held that:

Where the voters by their approval of a special levy do not require that each employee of a county board of education is to receive a designated amount of supplemental salary, the board of education may annually exercise sound discretion in allocating the special levy funds as salary supplements among its employee

Syl. Pt. 3, Bane, supra.

It is evident, therefore, that issues such as the question we are presented with herein turn on a case-by-case basis which is dependent upon the precise language used in the levy.

Turning our attention to the language of the levy, we observe that the wording of the levy is more analogous to the general language contained in Bane rather than the highly specific language contained in the Thomas cases. We believe that a prudent interpretation of the levy language demonstrates an intention by the voters of Logan County to provide broad support for local education over the six general categories contained in purposes one through six. An important addition, though, is the presence of purpose seven of the levy. Because of its importance, we quote purpose seven in its entirety:

(7) For authorization to the Board to expend, upon the funding of the above mentioned purposes and at the end of each fiscal year this levy is in force and effect or at the end of the five-year period this entire levy is in effect or otherwise, at such times as it may desire, any surplus which may accrue each fiscal year during the term of this levy for current expense and public school purposes.

The voters, through this provision, granted the board broad discretionary authority to use any levy surplus accruing after purposes one through six had been accomplished to meet current expenses and other public school purposes. The inclusion of this foresighted provision allowed for the flexibility to expend excess monies where needs occurred rather than insisting that extra monies be permanently locked into accounts for purposes that no longer needed additional funding. The nature of this provision and its obvious intention strengthens an interpretation of the levy that the voters of Logan County intended to provide their school board with flexibility in its operation once certain targeted needs had been accomplished. It strongly suggests that the fundamental intention of the voters was to provide general support for the county's schools as opposed to requiring levy monies to be bound to highly specific purposes, i.e., the building of specific buildings or the paying of a specific salary supplement.

I. Must the Funds from a Special Levy be Expended for All of the Requirements of a Special Levy call Even Though Additional Funds from Other Sources Have Been Made Available Which Will Fulfill Some of the Objectives of the Levy Call?

Because, as we have noted above, the answer to such an inquiry is dependent upon the precise facts of each case, it is impossible to provide a generic response to this question. Our answer is therefore limited to the peculiar facts of this case.

There are three relevant considerations that control our conclusion in this case. The first consideration is for what purposes the money was expended. It is our understanding that all levy monies were expended for a purpose enumerated in the levy proposal. The second consideration is the reason the expenditures were made. It is our understanding that the expenditures were made to avoid operating under a deficit in contravention of W. Va. Code § 11-8-26 and, importantly, to meet the salary funding purposes set forth in objectives one and two of the levy.

The third and most important consideration is the intention of the voters when they approved the special levy. Given the language of the levy, when read in its entirety, and given the fact

that outside sources had subsequently been obtained to meet the goals of purposes 3 through 5 of the levy, we do not believe that the transfer of monies from accounts meant for purposes 3 through 5 for use in meeting purposes 1 and 2 violates the intentions of the citizenry. We cannot believe that the voters of Logan County would have intended the result had these transfers not occurred. If the transfers had not occurred, the Board would have been unable to pay salaries of teachers and school workers, the very goals of levy purposes 1 and 2 while a surplus of monies accumulated in other school board accounts where the Board had managed to obtain collateral funds to meet those needs.

We therefore conclude, under the specific facts of this case, that where the Board received funds from other sources subsequent to the passage of the 1983 levy that fulfilled some of the objectives of the levy, funds generally earmarked for those objectives could be used to fulfill other objectives of the levy.³

II. Can funds received from a federal or state program satisfy both the objectives of the program and the levy?

Pursuant to the judicial interpretations above, we believe that the answer to this question is dependent upon the specific terms of the levy. If the terms of the levy are to provide a specific salary supplement such as in Thomas I and II, then no amount of outside funds can substitute for the specific pledge of the levy. Where the terms of the levy's objectives are more broadly defined, outside funds may be said to satisfy the objective of the levy in that it eliminates the need the objective was meant to address. However, levy funds must always be used to satisfy the expressed objectives of the levy. If a levy does not contain a "pour-over" provision such as that in purpose 7 discussed herein, a board could not use levy monies for a purpose outside those enumerated in the levy regardless of how much excess funds are

³This is not to say that this opinion should be taken as a carte blanc for the Board to engage in the wholesale transfer of levy funds. This opinion is only relevant to the emergency circumstances alleged in the correspondence we have received. As our opinion is based solely on this information, we make no comment on the validity of these representations. We do caution that deficits such as the one threatened here cannot be of the "manufactured" variety. Boards of education must live within their means. At some point in time if a board were to continually engage in the sorts of transfers involved here, a court may find either that the transfers no longer fit within the intentions of the voters or that the transfers were fraudulent, collusive or an abuse of discretion. See, Syl. Pt. 2, Bane v. Board of Education of Monongalia County, supra.

accumulated as a result of the combination of outside and levy funding.

III. If special levy funds must fulfill the objective of the levy, when must they be expended -- during the specified period of the levy or at a future date? Relatedly, if they can be expended in the future, how far in the future can they be expended for the purpose set out in the levy?

It is our belief that special levy funds must be expended in the time period specified in the levy. Normally in a levy, the voters elect to be taxed in order to meet specified needs for a specified period. Thus, we must look to the language of the levy and "be guided by the purpose the voters. . .sought to effect", in order to determine the time frame. Thomas I, supra at 89; 261 S.E.2d at 69. Accordingly, if the voters approve a levy with a specific time frame, then this element of the levy purpose must be met. If no specific time frame is provided, then it should be completed within a time frame as determined by the use of sound discretion and consistent with the spirit of the levy purpose in mind.

IV. As it relates to the November 1983 Special Levy, was the action of the Logan County School Board proper?


It is our belief, given our understanding of the factual situation provided by Secretary Lorensen and Superintendent Martin, and given our understanding of the statutory law and judicial interpretations thereof, that the Board's actions were not improper. We believe that the intentions of the voters of Logan County in the passage of the 1983 levy were effectuated by the actions of the Board and absent any clear showing of fraud, collusion or palpable abuse of discretion, we find no need to interfere with or encumber the funds of the board. See Syl. Pt. 2, Bane, supra.

As a final postscript, we note for future guidance of the Board and any other board faced with a similar dilemma concerning the appropriate expenditure of public funds that the superior course of action is to institute a legal proceeding to bring the question before a neutral court prior to the expenditure of said funds. Indeed, we specifically discourage the use of attorneys general opinions to resolve issues such as the one at hand. Neither seeking the advice of a prosecutor, the State Superintendent of Schools, nor this office will necessarily immunize a county board of education from contractual or other liabilities because a board follows that advice. Again, the superior future course of proceeding is for the board to institute a legal proceeding in the appropriate circuit court which includes

all proper parties and sufficient notice to the public, who are the ultimate parties in any matter involving public funds. See Maynard v. Board of Education of Wayne County, supra, 357 S.E.2d at 251, n. 7.

Very truly yours,

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ATTORNEY GENERAL


By: JOHN ERNEST SHANK
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