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February 2, 2009

The Honorable Glen B. Gainer III
State Auditor
State Capitol, Room W-100
Charleston, WV 25305

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OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

Re: Opinion Request regarding Senate Bill 622,
2008 Regular Session, Amending
West Virginia Code § 59-1-10(a)(1)

Dear Auditor Gainer:

This is in response to your opinion request regarding the amendment of West Virginia Code §59-1-10(a)(1) by Senate Bill 622, enacted during the 2008 regular session of the West Virginia Legislature.

The amendment provides that

(7) Eleven dollars of each recording fee received pursuant to subdivision (1) of this subsection shall be retained by the county clerk for the operation of that office and four dollars of each of the aforesaid recording fees together with five dollars of the recording fee collected pursuant to subdivision (5) of this section, shall be paid by the county clerk into the State Treasurer and deposited in equal amounts for deposit into the Farmland Protection Fund created in article twelve, chapter eight-a of this code for the benefit of the West Virginia Agricultural Land Protection Authority and into the Outdoor Heritage Conservation Fund created in article two-g, chapter five-b of this code: Provided, That the funds deposited pursuant to this subdivision may only be used for costs, excluding personnel costs, associated with purpose of land conservation, as defined in subsection (f), section seven, article two-g, chapter five-b of this code.¹

¹We are advised that the Legislature intended that the clerks retain the fees and not be required to pay the fees to the county treasury.

AL OPINION

West Virginia Code § 59-1-10 generally deals with the fees to be collected by the clerk of the county commission for admitting writings to record and §§ 59-1-28 and 59-1-31 provide for the disposition of the funds collected.

West Virginia Code § 59-1-28 provides in pertinent part that “all fees . . . which by law may now or hereafter be collected or received as compensation for services by any clerk of the county commission, . . . shall be collected and received by such officer for the sole use of the treasury of the county in which he is an officer, and shall be held as public moneys belonging to the county fund, and shall be accounted for and paid over in the manner hereinafter provided.”

West Virginia Code § 59-1-31 provides that “each of the officers named in section twenty-nine of this article shall at the end of each month pay into the county treasury all fees, . . . of whatever kind collected by his office during such month, which money shall be credited to the general county fund.”

Sections 28 and 31 appear to conflict with the newly-enacted provisions of § 59-1-10(a)(7), which provides that a portion of the fees “shall be retained by the county clerk for the operation of that office[.]”

As recently noted by our Supreme Court, “[W]here two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each.” *Harrison County Com'n v. Harrison County Assessor*, 222 W. Va. 25, ___, 658 S.E.2d 555, 560 (2008) (quoting Syl. pt. 4, in part, *State ex rel. Graney v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (1958)).

However, given the plain language of the statutes, there does not appear to be any construction that would give effect to the provisions of the statutes in question. Under such circumstances, one must rely on other rules of construction. In *Wiley v. Toppings*, 210 W. Va. 173, 175, 556 S. E. 2d 818, 820 (2001), our Supreme Court held that “[w]hen faced with two conflicting enactments, this Court and courts generally follow the black-letter principle that ‘effect should always be given to the latest . . . expression of the legislative will[.]’” (quoting *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 608, 49 S.E. 534,536 (1904)).

The Court went on to say: “[T]he statute which is more recent . . . prevails. . . . This rule applies even where the two statutes were enacted to be effective on the same date.” *Wiley*, 210 W.Va. at 175, 556 S.E.2d at 820 (quoting *Doe v. Attorney General*, 425 Mass. 210, 216-217, 680 N.E. 2d 92, 96 (1997)).

West Virginia Code §59-1-10(a)(7) is the more recently enacted statute, and pursuant to the Supreme Court decisions set forth above, such section prevails in any conflict with earlier enacted code provisions.

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Accordingly, the provisions directing the clerk of the county commission "shall be retained by the county clerk for the operation of that office" must be given effect.

With that background, we now address the question of whether or not the clerks may set up a new fund with the \$11.00 they retain. Your inquiry advises that "[t]he Clerks contend that since the bill [S.B. 622] did not specifically require the funds to be placed in the county treasury, they have the authority to set up a new fund." We understand from this assertion that the clerks contend that they are not required to pay these funds into the county treasury.

We believe that the Legislature intended to create a fund or a mechanism by which the clerks could retain the fees described in the newly-enacted statute, in order to give effect to the changes to the statute. Moreover, the new statute is specific with respect to the purpose of the funds – "for the operation of that office" – and any fund or account is an account which the office of the county clerk may deposit into and draw upon so as to give effect to the statute.

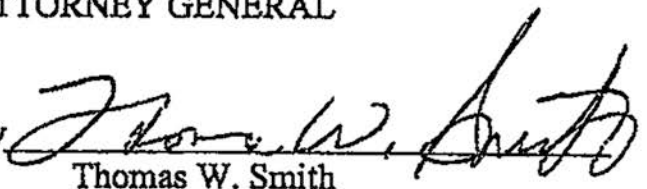
We now address the issue of whether the county clerks may create new funds without the authorization of the State Auditor. There are instances wherein county officials are authorized to establish separate funds, such as West Virginia Code §11-1C-8, creating a revolving valuation fund in each county which shall be used exclusively to fund the assessor's office. Other examples are separate funds maintained by state agencies that have statutory origins, such as the Regional Jail and Correctional Facility Authority Fund (West Virginia Code § 31-20-10), Court Security Fund (§ 51-3-14), and the Regional Jail Operations Partial Reimbursement Fund (§ 31-20-10b). These funds are described in West Virginia Code § 59-1-28a, which section provides for distribution of filing fees by circuit clerks and the establishment of specific funds to receive these distributions.

West Virginia Code § 6-9-11 provides the State Auditor with broad powers as the "chief inspector and supervisor of local government offices." It is our opinion that in the exercise of such powers, the State Auditor may exercise audit authority over such fund, but may not refuse to allow the creation of such fund or the use thereof.

Very truly yours,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By



Thomas W. Smith