OPINION
75-192

January 29, 1975 (OPINION)

Mr. Richard B. Thomas
State's Attorney
Ward County
Minot, ND 58701

RE: Maximum Levy for School Districts

Dear Mr. Thomas:

This is in reply to your letter of January 20, 1975, in which you enclose a letter dated January 8, 1975, from Gladys Pederson, Ward County Auditor, concerning the special reserve fund of school districts. That letter states the following facts and questions:

> Chapter 57-19 of the North Dakota Century Code provides for the establishment of a special reserve fund by school districts. Section 57-19-01 provides that such fund 'shall not exceed in amount at any one time the sum which could be produced by a levy of the maximum mill levy allowed by law in that district for that year.'
>
> Section 57-15-14 provides for the the tax levy limitation in school districts. Chapter 57-16 provides for excess levies in school districts and this would be by vote of the patrons of the school district. Would the amount voted by the patrons of the district be the amount allowed by law?

The letter further indicates that for many years it was the interpretation of the author that the amount of the levy as set by law would be the rate to use in extending against the taxable valuation of the school district to determine the dollar limitation on such funds. She cites in support of her conclusion a Department of Public Instruction publication under date of June 18, 1959, in which the Department inserted the word "normal" in describing the mill levy limitation to be used. Ms. Pederson further notes the Department had advised of a reversal in their position presumably based on information from the Attorney General's Office, citing a letter dated October 13, 1971, from Gerald VandeWalle, Assistant Attorney General. She asked for an official opinion on the matter. The letter to which Ms. Pederson refers is a letter addressed to Mr. Donald Oyos, Superintendent of Schools, Leonard, North Dakota, and after quoting the letter of request from Mr. Oyos, concludes:

> Several years ago this office construed this section with respect to the question presented. I am enclosing a copy of a letter written by this office on November 29, 1955, to Mr. Harry F. Montague, County Auditor, Minnewaukan, North Dakota. This was not an official opinion but does indicate the thoughts of this office with respect to the matter in question. You will note the letter does conclude that an approved excess levy may be included within the mill levy to determine the maximum

mill levy for the district.

Thus the interpretation of this office dates back not to 1971 but to 1955. The 1955 letter to Mr. Montague was in response to his letter in which he questioned the amount which could be levied for the special reserve fund and stated in part:

> As the Leeds School District has voted an increase of 25 percent in mill levy, it is my opinion that their maximum mill levy allowed in their district for the year 1955 would be 37.50 mills.

In response to that question, an Assistant Attorney General replied, in the letter of November 29, 1955:

> Since section 57-19-01 provides for the establishment and maintenance of a special reserve fund which shall not exceed in amount at any time the sum which could be produced by a levy of the maximum mill levy allowable by law in that district for that year, we are of the opinion that you may levy up to an amount which 37.50 mills will produce, because that is the maximum mill levy allowed by law after a 25 percent excess levy has been approved by the voters. The levy, however, may not exceed 3 mills in any one year for the maintenance of the special reserve fund.
>
> The question seems to be what is meant by the phrase 'maximum mill levy.' In your case we believe it means 37.50 mills.

Our office copy of that letter indicates a copy was sent to the Department of Public Instruction. It appears therefore that the interpretation placed upon the matter in Ward County was not statewide.

The Supreme Court of this State has held that where an act of Legislature is ambiguous, the courts will give weight to the practical and contemporaneous construction placed upon it by the Attorney General and, the officers charged with its administration. See Walker v. Wellenman 143 N.W.2d. 689 (N.D. 1966). In the cited case one of the parties contended on rehearing that the Attorney General's opinion referred to in the decision was not an official opinion of the Attorney General since it was written by the First Assistant Attorney General and did not have endorsed thereon the approval of the Attorney General either by initial or otherwise. The party contended that an opinion of an Assistant Attorney General is not an official opinion unless the Attorney General himself endorses his approval on such opinion. The Court, in considering this argument, stated page 697 of the reported case:

> This clearly is not the law in North Dakota. Our Constitution provides that the powers and duties of the Attorney General shall be prescribed by law. Section 83, N.D. Constitution. By law, the Legislature has authorized the Attorney General to appoint certain assistants. The Attorney General and his assistants are further authorized to institute actions whenever 'in their judgment' it is in the best interests of the state to do so. The Attorney General may also 'personally or through

> his assistants' make investigations of any matter properly referred to him. Chapter 54-12, N.D.C.C. The Attorney General is not required to act personally in every matter or to approve all acts of his assistants. The opinion of the First Assistant Attorney General is, in our opinion, the opinion of the Attorney General even though such opinion is not personally signed or initialed by the Attorney General himself.

It would thus appear the 1955 letter signed by an Assistant Attorney General has the force of the opinion of the Attorney General and thus is entitled to weight when construing an ambiguous statute. The opinion has been in effect for some nineteen plus years and, as such, cannot be said to be a new construction. We nevertheless will review the question presented on its merits.

Section 57-19-01 of the N.D.C.C., as noted above, provides that the mill levy for the special reserve fund cannot exceed in amount at any one time, "the sum which could be produced by a levy of the maximum mill levy allowed by law in that district for that year." The term "maximum mill levy" is not defined by statute and must therefore be construed in its ordinary sense. Section 1-02-02 of the N.D.C.C. While reference has been made to section 57-15-14 which prescribes tax levy limitations in school districts, we do not find the word "maximum" used in that statute and that statute does, in fact, provide for additional mill levies in school districts of over four thousand population upon a vote of the electorate. The word "maximum" is defined by Black's Law Dictionary, (Revised Fourth Edition) as: "The highest or greatest amount, quality, value, or degree." If we apply this definition to the statute it would provide that the special reserve fund could not exceed in amount at any one time the sum which could be produced by a levy of the highest or greatest levy allowed by law in that district for that year. An excess levy approved by the electorate and permitted to be levied by the school district must be included in the highest or greatest levy of the district. We also note the statute is specific in referring to "that district for that year," indicating that in some other district or in some other year the levy may not be as great. The reasons the levy might not be as great in some other district or in some other year might be due to several reasons, including the fact that such other district had not approved an excess levy or that an excess levy has expired, etc.

We cannot explain why the Department of Public Instruction in its publication inserted the word "normal." The very fact that such publication used a word not included in the statute is perhaps indicative of the fact the statute is ambiguous. However the insertion of that modifying term "normal" by the Department is not a justified statutory construction since the term is nowhere found in the statute. Were the term included in section 57-19-01 our conclusion might well be different.

In summary, it is our opinion that the term "maximum mill levy allowed by law in that district for that year" as used in section 57-19-01 of the N.D.C.C. would include an excess levy approved by the electorate pursuant to section 57-15-14 or Chapter 57-16 of the N.D.C.C. if that excess levy may be made in that district in that year.

Sincerely yours,

ALLEN I. OLSON

Attorney General