

Opinion No. 2012-101

October 23, 2012

The Honorable Uvalde Lindsey  
State Representative  
2257 East Gentle Oaks Lane  
Fayetteville, Arkansas 72703-6142

Dear Representative Lindsey:

This is my opinion on your questions about a proposed use of revenues from a tax levied under the Advertising and Promotion Commission Act (the “Act”).<sup>1</sup> The Act authorizes a municipal tax, sometimes referred to as the “hamburger tax,” on hotel and restaurant sales (the “A&P tax”).<sup>2</sup> Tax revenues are deposited in a municipal advertising and promotion fund (the “A&P fund”).<sup>3</sup> A city levying the A&P tax must create a municipal advertising and promotion commission (the “A&P commission”).<sup>4</sup>

You provide these facts:

The University of Arkansas at Fayetteville has sought the support of the Fayetteville Advertising and Promotion Commission to renovate its historic Field House into a 700 seat, state-of-the-art venue for musical and theatrical performances. The University is asking for a commitment from the A&P Commission of \$1 million, payable over 3 years, to aid in financing the project, which is estimated to cost \$17 million.

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<sup>1</sup> A.C.A. §§ 26-75-601 to -618 (Repl. 2008, Supp. 2011).

<sup>2</sup> See A.C.A. § 26-75-602 (Supp. 2011).

<sup>3</sup> See A.C.A. § 26-75-604 (Repl. 2008).

<sup>4</sup> See A.C.A. § 26-75-605 (Repl. 2008).

I assume for purposes of this opinion that (a) the proposed contribution will be a gift, not consideration under a contract, (b) the university will own and operate the venue, and (c) performances will generally be open to the public.

Your questions are:

1. Is it permissible in any manner for a city to use its advertising and promotion tax income to contribute to the renovation of an arts venue for a state university?
2. Can the Fayetteville Advertising and Promotion Commission commit to assist in financing this project over a three year period?

## **RESPONSE**

The answers to both your questions ultimately depend on the prevailing facts. Not being fully informed of all the material facts, I cannot render a definitive opinion with respect to either of your questions. I can say, however, on the basis of the facts supplied and assumed, I believe that the A&P Commission may donate A&P tax revenues to the university for the proposed project under either or both of two statutory provisions discussed below. Of course, a court of competent jurisdiction with full access to the facts may reach another conclusion; however, I believe that would be unlikely. The proposed three-year commitment will be subject to a constitutional restriction on municipal finance,<sup>5</sup> but whether the commitment would contravene the constitutional provision cannot be determined from the facts supplied and assumed.

***Question 1 – Is it permissible in any manner for a city to use its advertising and promotion tax income to contribute to the renovation of an arts venue for a state university?***

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<sup>5</sup> See Ark. Const. art. 12, § 4.

A statute lists permissible uses of money in an A&P fund, and imposes limits on the money's uses.<sup>6</sup>

Whether the statute permits a proposed use of A&P tax revenues is a question that turns on the facts and circumstances of the particular case.<sup>7</sup> Governing law provides that the A&P commission "is the body that determines the use of the city [A&P] fund."<sup>8</sup> An A&P commission has wide discretion to determine whether the statute permits a proposed use of A&P tax proceeds.<sup>9</sup> And an administrative body's interpretation of a controlling statute is given considerable deference and will not be overturned unless clearly wrong.<sup>10</sup>

Because the answer to your question depends on the prevailing facts and circumstances, and because this office, in its opinions function, has neither the authority nor the resources to act as a finder of fact, I am not fully informed of all material facts and cannot answer your question definitively. As a general proposition, however, on the basis of the facts supplied and assumed, it appears likely that one or both of two provisions of the relevant statute would permit the proposed use.<sup>11</sup>

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<sup>6</sup> See A.C.A. § 26-75-606(a), (b) (permissible uses) and (c) (limits); *see generally* Op. Att'y Gen. 2011-005 (opining that an A&P commission may spend amounts in the A&P fund only as authorized in A.C.A. § 26-75-606(a) or (b), and only if not barred by A.C.A. § 26-75-606(c)).

<sup>7</sup> *See, e.g.*, Op. Att'y Gen. 2008-121.

<sup>8</sup> A.C.A. § 26-75-606(a)(2)(A).

<sup>9</sup> *See, e.g.*, Op. Att'y Gen. 2008-121 and opinions cited therein.

<sup>10</sup> *See, e.g., Brookshire v. Adcock*, 2009 Ark. 207, 307 S.W.3d 22.

<sup>11</sup> Because the proposed recipient of A&P tax revenues, the University of Arkansas, is a public body, a constitutional prohibition on donating public money to private entities likely does not come into play. *See* Ark. Const. art. 12, § 5 (prohibiting cities from "obtain[ing] or appropriat[ing] money for . . . any corporation, association, institution or individual"); *compare, e.g.*, Op. Att'y Gen. 2007-276 (A&P commission probably may not donate to private entity operating city history museum), *with, e.g.*, Op. Att'y Gen. 2012-066 (county probably may donate to city). If my assumption that the payment will be a donation is incorrect, and the payment will in fact be consideration under a valid contract, then the constitutional prohibition will not apply. *See, e.g., City of Ft. Smith v. Bates*, 260 Ark. 777, 544 S.W.2d 525 (1976) (Ark. Const. art. 12, § 5, does not limit city's power to give consideration under contract).

First, the statute allows “funding of the arts” from A&P tax revenues if the A&P commission determines that the funding “is necessary for or supporting of its city’s advertising and promotion endeavors . . . .”<sup>12</sup> A predecessor in this office opined that this provision likely authorizes funding a local arts council.<sup>13</sup> I have located no other application of this subsection.

It is self-evident that a “venue for musical and theatrical performances” is an arts-related facility, and you refer to it in your question as an “arts venue.” While the question is ultimately one of fact, I can opine generally that it is unlikely that a court would overturn an A&P commission’s determinations that using A&P tax revenues to help establish a performance hall “is necessary for or supporting of the city’s advertising and promotion endeavors,” and that the use constitutes “funding of the arts.”<sup>14</sup>

Second, the statute allows use of A&P tax proceeds for “construction, reconstruction, repair, maintenance, improvement, equipping, and operation of public recreation facilities . . . .”<sup>15</sup> I stated on another occasion:

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<sup>12</sup> A.C.A. § 26-75-606(a)(2)(B).

<sup>13</sup> See Op. Att’y Gen. 89-388.

<sup>14</sup> See A.C.A. § 26-75-606(a)(2)(B).

<sup>15</sup> A.C.A. § 26-75-606(b)(2). The law allows an A&P commission to spend A&P tax revenues on public recreation facilities “in the city or the county where the city is located if the city owns an interest in the . . . facility . . . .” A.C.A. § 26-75-606(b)(2); see also A.C.A. § 26-75-606(a)(1)(A)(iii) (identical restriction on using money A&P tax revenues for “[o]peration of tourist promotion facilities”). A predecessor in this office and I have rendered opinions interpreting this language to mean that the city must own an interest in any public recreation or tourist promotion facility on which A&F tax revenues are spent, regardless of whether the facility is located within or outside the city. See Op. Att’y Gen. 2011-005, 2010-034, 2008-121, 2007-276, 2007-221, and 2006-207. But I do not believe that conclusion is compelled by the plain meaning of the statute’s language. A statute is ambiguous “where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning.” *Thomas v. Hall*, 2012 Ark. 66, \*5, 2012 WL 503879. In my view, the statute is ambiguous in this particular. Reasonable minds may differ as to whether the ownership requirement applies when the facility is located within the city. When a statute is ambiguous, courts apply rules of statutory construction to determine legislative intent and the statute’s meaning. See, e.g., *id.* In such cases the courts also look to the legislative history. See, e.g., *Intents, Inc. v. Southwestern Elec. Power Co.*, 2011 Ark. 32, \_\_\_ S.W.3d. \_\_\_, 2011 WL 227788. Regarding the legislative history of the provision in question, Act 2241 of 2005 added the ownership requirement. Before 2005, an A&P commission had no authority to spend A&P tax revenues on facilities outside the city, but neither was there a requirement that the city have an ownership interest in a facility on which A&P tax revenues could be spent. As originally introduced, the bill that

[V]isiting a museum would appear to be consistent with the following definitions of the term “recreation”:

1. refreshment by means of some pastime, agreeable exercise, or the like.
2. a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.

Random House Webster's Unabridged Dictionary (2d ed. 1999).<sup>[16]</sup>

Attending a musical or theatrical performance would likewise appear to be consistent with the quoted definitions. As stated above, I assume that the university will own and operate the venue and that performances generally will be open to the public, suggesting that the “public” element of “public recreation facility” will be met. While the question is ultimately one of fact, it is unlikely, in my view, that a court would overturn an A&P commission’s determination that the proposed venue will be a “public recreation facility,” and therefore that the statute permits using A&P tax revenues to help build the venue.

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became Act 2241 would have changed the law to permit A&P funds to be spent on an eligible facility within the county where the city is located, regardless of ownership. *See* HB 2820 (Mar. 7, 2005). The bill was amended to add the ownership requirement, and was enacted into law. *See* HB 2820 (amendment form Mar. 30, 2005, and bill as engrossed Apr. 1, 2005). In my view, Act 2241’s history clearly indicates that the legislature intended only to expand an A&P commission’s extraterritorial authority (by permitting, subject to the ownership requirement, certain expenditures outside the city), not to restrict its authority within the city by imposing a new ownership requirement that did not exist before Act 2241. Additionally, a rule of statutory interpretation provides that “referential and qualifying phrases, where no contrary intention appears, relate only to the last antecedent” and that “evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.” *McCoy v. Walker*, 317 Ark. 86, 90, 876 S.W.2d 252 (1994). Here, the referential phrase “if the city owns an interest in the . . . facility” is not separated by a comma from the antecedents “the city” and “the county where the city is located” and therefore should be interpreted to apply only to the last antecedent, *i.e.*, “the county where the city is located.” On reconsideration, then, it is my view that the ownership requirement applies only when the facility is located outside the city. It is my understanding that the building at issue here is located within the City of Fayetteville.

<sup>16</sup> Op. Att’y Gen. 2007-276.

As noted above, the statute contains limitations on the use of money in the A&P fund, including that it may not be used for “general capital improvements,” “costs associated with the general operation of the city,” or “general subsidy of any civic group or the chamber of commerce.”<sup>17</sup> Under the facts as I understand them, the proposed use clearly would not constitute a “general subsidy of [a] civic group or the chamber of commerce,” and it probably could not be reasonably deemed to be part of the “general operation of the city.”<sup>18</sup> And absent material facts of which I am not aware and which are not suggested by your request, it is unlikely, in my view, that a court would overturn the A&P commission’s determination that the proposed venue does not constitute a “general capital improvement.”<sup>19</sup>

***Question 2 – Can the Fayetteville Advertising and Promotion Commission commit to assist in financing this project over a three year period?***

The concern that prompts this question is not entirely clear, but I assume the question relates to a section of the Arkansas Constitution which provides in relevant part that

[t]he fiscal affairs of . . . cities . . . shall be conducted on a sound financial basis, and [no] city council . . . or commissioners, of any city . . . [shall] enter into any contract or make any allowance for any purpose whatsoever, or authorize the issuance of any contract . . . in excess of the revenue for such city . . . for the current fiscal year. . . .<sup>[20]</sup>

Any multi-year municipal commitment will be subject to this rule.<sup>21</sup> “Determining whether this proscription has been violated will entail in each instance undertaking a factual inquiry of the sort that this office is neither equipped nor authorized to

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<sup>17</sup> A.C.A. § 26-75-606(c)(2).

<sup>18</sup> See A.C.A. § 26-75-606(c)(2)(C), (B).

<sup>19</sup> See A.C.A. § 26-75-606(c)(2)(A).

<sup>20</sup> Ark. Const. art. 12, § 4.

<sup>21</sup> See generally, e.g., Op. Att’y Gen. 2008-161.

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conduct.”<sup>22</sup> Local officials should examine a city’s fiscal affairs in each instance to determine whether a given commitment is consistent with the constitution. The whole of the city’s revenues, contracts, and allowances, not just those of the A&P commission, must be considered.<sup>23</sup>

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/JMB:cyh

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<sup>22</sup> *Id.*

<sup>23</sup> *See* Op. Att’y Gen. 95-328.