



Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

TO: Mayor Jordan
Alderman Justin Tennant
Alderman Bobby Ferrell

CC: Advertising and Promotion Commissioners

FROM: Kit Williams, City Attorney

A handwritten signature in black ink, appearing to read "Kit Williams", with a long horizontal line extending to the right.

DATE: July 13, 2012

RE: Legal authority to spend \$1 million for University's
600 seat concert hall

I was very impressed with the University of Arkansas's proposed concert hall to be constructed in the old Men's Gym. This appears to be a very elegant remodel and reuse of the University's first field house where I attended my first live symphony orchestra concert in the early 60's. Chancellor Gearhart presented a convincing case for the need of this concert hall and for its benefit not only for U of A faculty, staff and students, but for Fayetteville citizens, businesses, and tourists.

However, before spending One Million taxpayer dollars, the Advertising and Promotion Commission should ensure such expenditure is legal by conducting a "due diligence" examination of its legal power, responsibility and authority to expend \$1,000,000.00 for this project. A casual telephone conversation between the Executive Director and an unnamed Assistant Attorney General is not "due diligence."

There are some legal concerns about the A & P Commission spending a million dollars to remodel University of Arkansas property. A.C.A. §26-75-606 **Use of funds collected** does empower the A & P Commission to use its revenues "for the operation of tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities or for the retirement of

bonds issued for the establishment and operation of other tourist-oriented facilities” A.C.A. §26-75-606 (b)(1)(A). The University Concert Hall might very well be characterized as a “family entertainment facility”.

Unfortunately, the statutory section quoted above only authorized expenditures for the “**operation**” of such family entertainment facility “or for the **retirement of bonds.**” It does not authorize direct expenditure of current revenue for capital projects. The next subsection controls funds to be used for construction and reconstruction such as the proposed of U of A Concert Hall.

“Funds credited to the city advertising and promotion fund ... may be used, spent or pledged by the commission ... on the construction, reconstruction, repair, maintenance, improvement, equipping and operation of public recreation facilities in the city or the county where the city is located **if the city owns an interest in the center or facility**”
A.C.A. §26-75-606 (b)(2) (emphasis added).

The City of Fayetteville obviously does not own any interest in the University of Arkansas proposed Concert Hall on campus. The issue is: What does “if the city owns an interest in the center or facility” modify? If it modifies both “the city or the county where the city is located,” then this power to spend tax revenue would not apply to the proposed University Concert Hall. If it only modifies the second part of that phrase, then as long as the concert hall is within Fayetteville (which it is), the Advertising and Promotion Commission would have the statutory authority to use or spend the taxpayers money for the U of A Concert Hall’s remodeling. (There might still be some constitutional issues. See Article 12 sections 4 & 5 of the Arkansas Constitution.)

This same phrase is used in A.C.A. §26-75-606 (a)(1)(A)(iii): “Operation of tourist promotion facilities in the city or in the country where the city is located if the city owns an interest in the convention center or facility” I have attached the statutory code section for your review. As you can see, the legislature provided no commas or other hints to help us decipher whether the final phrase was applicable to both preceding terms or only to the second term.

The last thing anyone would want is litigation or even the threat of litigation over this possible million dollar expenditure. Unfortunately since a “taxpayer attorney” would likely receive a \$300,000.00 attorneys fee if a Court determined

that the “if the city owns an interest in the center or facility” applied to both the city and county where the city is located, the unclear statute might be too tempting to escape litigation.

The other powers granted to the Advertising and Promotion Commission “funding of the arts” and “purchase ... or otherwise deal in ... of real property” are both limited to the other uses pursuant to or in accordance with the section (quoted above). Thus, these “powers” are subservient to the other authority sections and especially 606(b).

I personally believe that there is a better than even chance that the Courts would limit the reach and modifying power of “if the city owns an interest in the center or facility” to the county location or in another way uphold the proposed expenditure of the million dollars. However, a reasonable (and even strong) argument can be made that this clause should also modify the city location to ensure taxpayer money is not given away to a favored, for profit business to build its own “public recreational facility” wherever it might be located. Thus, before such a decision is made, I recommend at a minimum that a formal Arkansas Attorney General Opinion be obtained.

A recent Arkansas Attorney General’s Opinion No. 2007-221 involved the possible use of A & P Commission “funds to renovate and repair the bleachers and concession stand area of the Helena-West Helena High School”. In that opinion, the Arkansas Attorney General discussed the same statutory power sections that we are faced with. He opined that “the financing by an A & P Commission of ‘public recreation facilities’ in the city or county, **authorizes an expenditure only if the city ‘owns an interest in the center or facility.’**” (page 1; emphasis added). The City admittedly did not own any such interest, but the Attorney General concluded “I believe the proposed expenditures would pass muster if the A & P Commission reasonably concluded that they would promote tourism and/or conventions.” (page 2).

The Arkansas Attorney General interpreted subsection (b)(2) which provides the power to spend money to construct and reconstruct public recreation facilities **as dependent upon the city having an interest in the facility.**

“I should further note that A.C.A. §26-75-606(b)(2), which addresses the financing by an A&P commission of ‘public recreation facilities’ in the city or county, authorizes such an

expenditure only if the city 'owns an interest in the center or facility.' Given your report that the school district exclusively owns the high school at issue, a finder of fact might conceivably conclude that the commission is statutorily barred from making the expenditures contemplated in your request." (pages 5-6)

However, in that situation the Attorney General felt that (b)(1) provided sufficient authority and this section does not include the limiting phrase "if the city owns an interesting the center or facility." I would agree with the Attorney General if he means by "financing" this improvement, the retirement or payment of bond debt. However, the direct expenditure of A & P Commission funds is limited by this section of the statute "for the **operation**" of such facilities, not their construction, reconstruction, repair or establishment.

If Fayetteville citizens voted to fund a million dollars of improvements for the U of A Concert Hall through the sale of bonds, then retirement of these bonds would be statutorily authorized regardless of no city ownership rights to the concert hall. It is possible that the legislature felt that either the public protection of a required election to issue bonds or the requirement that the city own an interest in the facility was necessary before substantial capital expenditures be made with taxpayer money.

I have attached Arkansas Attorney General Opinion No. 2007-221 for your consideration. I requested that you obtain your own attorney prior to attempting to negotiate a million dollar deal to buy the Old Post Office. Thank you for doing so. Again you are faced with a million dollar decision with complicated legal issues of your authority and power to spend current revenue or to issue bonds to assist the University in a worthy endeavor. **Please consult with your attorneys for their analysis and recommendation.** Their counsel is like a legal insurance policy. It is better to pay a premium than to stand unguarded against real litigation dangers.

26-75-606. Use of funds collected.

(a)(1)(A) In the manner as shall be determined by the municipal advertising and promotion commission, all funds credited to the city advertising and promotion fund pursuant to this subchapter shall be used for the:

- (i) Advertising and promoting of the city and its environs;
- (ii) Construction, reconstruction, extension, equipment, improvement, maintenance, repair, and operation of a convention center;
- (iii) Operation of tourist promotion facilities in the city or the county where the city is located if the city owns an interest in the convention center or facility, and facilities necessary for, supporting, or otherwise pertaining to, a convention center; or
- (iv) Payment of the principal of, interest on, and fees and expenses in connection with bonds as provided in this subchapter.

(B) The commission may engage such personnel and agencies and incur such administrative costs as it deems necessary to conduct its business.

(2)(A) The commission is the body that determines the use of the city advertising and promotion fund.

(B) Pursuant to this section, if the commission determines that funding of the arts is necessary for or supporting of its city's advertising and promotion endeavors, the commission may use its funds derived from the hotel and restaurant tax.

(3)(A) The commission may purchase, own, operate, sell, lease, contract, or otherwise deal in or dispose of real property, buildings, improvements, or facilities of any nature in accordance with this subchapter.

(B) If the commission is dissolved, the city shall assume the authority under subdivision (a)(3)(A) of this section.

(b)(1)(A) Any city of the first class that may levy and does levy a tax pursuant to this subchapter may use or pledge all or any part of the revenues derived from the tax for the purposes prescribed in this subchapter or for the operation of tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities or for the retirement of bonds issued for the establishment and operation of other tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities.

(B) These revenues shall be used or pledged for the purposes authorized in this subsection only upon approval of the commission created pursuant to this subchapter.

(2) Funds credited to the city advertising and promotion fund pursuant to this subchapter may be used, spent, or pledged by the commission, in addition to all other purposes prescribed in this subchapter, on and for the construction, reconstruction, repair, maintenance, improvement, equipping, and operation of public recreation facilities in the city or the county where the city is located if the city owns an interest in the center or facility, including, but not limited to,

facilities constituting city parks and also for the payment of the principal of, interest on, and fees and expenses in connection with bonds as provided in this subchapter in the manner as shall be determined by the commission for the purpose of such payment.

(c)(1) All local taxes levied as authorized in § 26-75-602(a) shall be credited to the city advertising and promotion fund and shall be used for the purposes described in subsections (a) and (b) of this section.

(2) The taxes shall not be used:

(A) For general capital improvements within the city or county;

(B) For the costs associated with the general operation of the city or county; or

(C) For general subsidy of any civic group or the chamber of commerce.

(3) However, the commission may contract with such groups to provide to the commission actual services that are connected with tourism events or conventions.

(4) The authorization and limitations contained in this subsection shall be reasonably construed so as to provide funds for promoting and encouraging tourism and conventions while not allowing such special revenues to be utilized for expenditures that are normally paid from general revenues of the city.

History. Acts 1965, No. 185, § 6; 1969, No. 123, § 3; 1971, No. 188, § 1; 1977, No. 178, § 2; 1981, No. 20, § 2; 1983, No. 821, § 1; A.S.A. 1947, §§ 19-4617, 19-4617.1; Acts 1989, No. 626, § 3; 1989, No. 650, § 1; 1991, No. 726, § 2; 1991, No. 1178, § 1; 1993, No. 347, § 2; 1993, No. 364, §§ 4-6; 2005, No. 2241, § 1; 2007, No. 390, § 1.

Publisher's Notes. See Publisher's notes to § 26-75-602.

As to legislative findings, see Publisher's Notes, § 26-75-602.

Acts 1991, No. 1178, § 2, provided: "It is

the intent of this act to affirm the authority of city advertising and promotion commissions over the use of the city advertising and promotion commission funds for administrative and promotional purposes."

Amendments. The 2005 amendment inserted the subdivision designations in (a)(1); inserted "or the county where the city is located if the city owns an interest in the center or facility" in (a)(1)(A) and (b)(2); and added "or county" in (c)(2)(A) and (B).

The 2007 amendment added (a)(3).

CASE NOTES

Authority of Commission.

An implied power in the City of Hot Springs Advertising and Promotion Commission is not read into this subchapter for the commission to sue to collect com-

missions on the sale of food and beverages. *City of Hot Springs Adv. & Promotion Comm'n v. Cole*, 317 Ark. 269, 878 S.W.2d 371 (1994).

26-75-607. Authority to issue bonds.

Cities of the first class levying the tax and creating the commission as permitted in this subchapter are authorized to:

(1) Acquire sites for, construct, reconstruct, extend, equip, improve, maintain, and operate convention centers and facilities necessary for, supporting, or otherwise pertaining to, convention centers which are

Opinion No. 2007-221

September 28, 2007

The Honorable Clark Hall
State Representative
302 Elm Street
Marvell, AR 72366-8729

Dear Representative Hall:

I am writing in response to your request for my opinion on the following questions:

1. May the City of Helena-West Helena use Advertising and Promotion (A&P) Commission funds to renovate and repair the bleachers and concession stand area of the Helena-West Helena High School?
2. Does it make any difference that the property to be improved is owned by the Helena-West Helena School District and not the City of Helena-West Helena?

RESPONSE

With respect to your first question, a local A&P commission has considerable discretion to commit funds to encourage tourism and conventions in the city it serves. The question of whether the proposed use of the funds in this instance would fall within the commission's authority is one of fact that I am neither situated nor authorized to address. With respect to your second question, A.C.A. § 26-75-606(b)(2), which addresses the financing by an A&P commission of "public recreation facilities" in the city or county, authorizes such an expenditure only if the city "owns an interest in the center or facility." I question, however, whether the legislature intended the referenced "facilities" to include areas of the sort at

issue here. Although the law on this issue would benefit from legislative clarification, I believe the proposed expenditures would pass muster if the A&P commission reasonably concluded that they would promote tourism and/or conventions.

Question 1: May the City of Helena-West Helena use Advertising and Promotion (A&P) Commission funds to renovate and repair the bleachers and concession stand area of the Helena-West Helena High School?

In my opinion, the local A&P commission might commit funds to this project if it reasonably concluded that the expenditure would promote and encourage tourism and/or conventions in the City of Helena-West Helena. I believe a reviewing court would uphold the commission's determination in this regard unless the court concluded that the commission's decision was clearly wrong.

As you acknowledge in your opinion request, this office has addressed questions materially indistinguishable from your own on at least three occasions. Most recently, in the attached Ark. Op. Att'y Gen. No. 2005-176, my immediate predecessor addressed whether a local A&P commission could expend funds on public high school athletic facilities. My predecessor identified as the pertinent legislation A.C.A. § 26-75-606 (currently codified at Supp. 2007), which provides in pertinent part:

(a)(1)(A) In the manner as shall be determined by the municipal advertising and promotion commission, all funds credited to the city advertising and promotion fund pursuant to this subchapter shall be used for the:

(i) Advertising and promoting of the city and its environs;

* * *

(iv) Payment of the principal of, interest on, and fees and expenses in connection with bonds as provided in this subchapter.

(B) The commission may engage such personnel and agencies and incur such administrative costs as it deems necessary to conduct its business.

(2)(A) The commission is the body that determines the use of the city advertising and promotion fund.

* * *

(b)(1)(A) Any city of the first class that may levy and does levy a tax pursuant to this subchapter may use or pledge all or any part of the revenues derived from the tax for the purposes prescribed in this subchapter or for the operation of tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities or for the retirement of bonds issued for the establishment and operation of other tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities.

(B) These revenues shall be used or pledged for the purposes authorized in this subsection only upon approval of the commission created pursuant to this subchapter.

(2) Funds credited to the city advertising and promotion fund pursuant to this subchapter may be used, spent, or pledged by the commission, in addition to all other purposes prescribed in this subchapter, on and for the construction, reconstruction, repair, maintenance, improvement, equipping, and operation of public recreation facilities in the city or the county where the city is located if the city owns an interest in the center or facility, including, but not limited to, facilities constituting city parks and also for the payment of the principal of, interest on, and fees and expenses in connection with bonds as provided in this subchapter in the manner as shall be determined by the commission for the purpose of such payment.

(c)(1) All local taxes levied as authorized in § 26-75-602(a) shall be credited to the city advertising and promotion fund and shall be used for the purposes described in subsections (a) and (b) of this section.

(2) The taxes shall not be used:

- (A) For general capital improvements within the city or county;
 - (B) For the costs associated with the general operation of the city or county; or
 - (C) For general subsidy of any civic group or the chamber of commerce.
- (3) However, the commission may contract with such groups to provide to the commission actual services that are connected with tourism events or conventions.
- (4) The authorization and limitations contained in this subsection shall be reasonably construed so as to provide funds for promoting and encouraging tourism and conventions while not allowing such special revenues to be utilized for expenditures that are normally paid from general revenues of the city.

In discussing the application of this statute, my predecessor offered the following:

I and several of my predecessors have in past opinions addressed issues similar to the ones that you have raised. In Ark. Op. Att'y Gen. No 2003-154, I approved as proper in form and consistent with Arkansas law an interlocal agreement among various entities, including the North Little Rock Advertising and Promotion Commission, that called for the improvement, repair, and operation of the Wildcat Stadium and Athletic Field located at the North Little Rock High School East Campus. However, in approving the agreement, I offered the following caveats:

Although the agreement does not outline any of the particular requirements of law by which the individual parties are bound (nor is it required to do so), the parties must nevertheless be diligent in complying with the various strictures of law that could impact upon their participation in the agreement. *See, e.g., Ark. Const., Art. 12, § 4 (concerning local governments' fiscal affairs); Ark. Const., Art. 12, § 5 (concerning local governments lending credit);*

A.C.A. § 14-58-501 *et seq.* and A.C.A. § 26-73-114 (concerning financial aid by cities to public schools); **A.C.A. § 26-75-606 (concerning permissible uses of advertising and promotion funds)**; A.C.A. § 14-269-305 (concerning restrictions on the use of park funds); Ark. Const., Art. 14, §§ 2 and 3, and A.C.A. § 6-21-101 (concerning the use of school property by non-school entities and for non-school purposes).

(Emphasis added.)

As my predecessor pointed out in Opinion No. 2002-310:

[T]he advertising and promotion commission has wide discretion in determining factually whether a particular use of advertising and promotion funds falls within the permissible uses thereof as stated in A.C.A. § 26-75-606. *See, e.g.*, Ops. Att’y Gen. Nos. 2001-031; 98-112; 97-259; 96-383. The Arkansas courts have consistently held that a body’s interpretation of a statute that it is charged with administering will be given considerable deference and will not be overturned unless it is clearly wrong. *See, e.g., Death & Permanent Total Disability v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002); *Yamaha Motor Corp. v. Richard’s Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001); *Cyphers v. United Parcel Service*, 68 Ark. App. 62, 3 S.W.3d 698 (1999); *Little Rock Cleaning Sys. Inc. v. Weiss*, 326 Ark. 1007, 935 S.W.2d 268 (1996); *Douglass v. Dynamic Enters., Inc.*, 315 Ark. 575, 869 S.W.2d 14 (1994). Thus, if the Dumas Advertising and Promotion Commission determined factually that the use of advertising and promotion funds to help purchase high school football uniforms would “promot[e] and encourag[e] tourism and conventions” in Dumas, its determination will be upheld unless a court finds that determination to be clearly wrong.

Nevertheless, I feel obliged to stress that an A&P commission in the exercise of its broad discretion must remain committed to expending its funds only in the cause of promoting tourism and conventions. I should further note that A.C.A. § 26-75-606(b)(2), which addresses the financing by an A&P commission of “public

recreation facilities” in the city or county, authorizes such an expenditure only if the city “owns an interest in the center or facility.” Given your report that the school district exclusively owns the high school at issue, a finder of fact might conceivably conclude that the commission is statutorily barred from making the expenditures contemplated in your request. By the same token, however, subsection (b)(1) of the statute without limitation authorizes an A&P commission to expend its resources to support “family entertainment facilities” -- a category that might conceivably be read as including the school facilities at issue in your request. I question, however, whether the legislature intended either of these statutory terms to apply to facilities such as a high-school concession area or bleachers, leaving the operative issue being whether the proposed use of funds might reasonably be deemed to promote tourism or conventions.

Finally, I must note that the power of a city or its agencies to provide funds without consideration to some other entity is bounded by the constitutional strictures of Ark. Const. art. 12, § 5, which forbids any local governmental entity to “appropriate money for, or loan its credit to, any corporation, association, institution or individual.” I am attaching for your information a copy of Ark. Op. Att’y Gen. No. 1999-408, which addresses in detail the constitutional restrictions that apply to a local unit of government’s donating its public funds. Without repeating my analysis, I will simply offer that a statutorily authorized gift of money by a city to a public entity like a school district in the city, would not offend the constitution.

Question 2: Does it make any difference that the property to be improved is owned by the Helena-West Helena School District and not the City of Helena-West Helena?

For reasons discussed in my response to your first question, I believe the answer to this question is “no.” In my opinion, a city’s donation through its A&P commission of funds to another purely public entity contained within its territorial jurisdiction would be permissible so long as the expenditure served the taxpayer-approved purpose of promoting tourism and/or conventions. As noted above, only a finder of fact could determine whether the expenditures would indeed serve such a purpose.

The Honorable Clark Hall
State Representative
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Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosures