

Opinion No. 2011-148

February 24, 2012

The Honorable Gene Jeffress  
State Senator  
1483 Ouachita 47  
Louann, Arkansas 71751-8761

Dear Senator Jeffress:

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

1. Did the City of Hampton have the authority to require a builder to obtain a builder's permit and charge for such a permit prior to the time the city enacted an ordinance requiring a builder to obtain and to pay for a builder's permit?
2. If the city had no such authority, does the city have the legal obligation to remit the costs of the building permits back to the builder and, ultimately, back to the Hampton School District?

By way of background, you report that the Hampton School District contracted with a company to build both a new high school and a gym/agriculture building. The City of Hampton reportedly informed the construction company that it would need to purchase a building permit to begin construction. The construction company paid a fee of \$8,124.00 for the permit in 2009. The city later conditioned construction of the gym/agriculture building upon the company's obtaining an additional building permit, which the company did, at a cost of \$12,925.36 on August 4, 2011. You indicate that the Hampton School District reimbursed these expenses, causing it a financial burden. The Hampton School District has reportedly discovered that the city did not enact an ordinance authorizing charging for building permits until October 2011 – after the company had paid the fees in response to the city's demands. You further report that the city council voted in

1988 “to permit the city to adopt an ordinance charging for a builder’s permit,”<sup>1</sup> but that no such ordinance was adopted until October 2011.

For reasons whose significance is discussed below, I note that Hampton is a city of the second class.

## **RESPONSE**

Your first question appears premised on an assumption that a city of the second class like Hampton is authorized to issue and to charge for building permits. Although the law on this score invites clarification, this assumption appears to be correct. With certain exceptions, the law appears to contemplate that construction within city limits be by permit and that a city of any class may charge a fee for the issuance of a building permit. However, in my opinion, it would be impermissible for the city to impose any such requirement before the city council had adopted an authorizing ordinance to that effect. I consider it immaterial that the city council may previously have adopted an ordinance purporting to allow itself by a later ordinance actually to impose the fee requirement. With respect to your second question, assuming the payments were not “coerced” under the applicable legal standard or were not the subject of then pending litigation, I believe the voluntary payment rule would bar any recovery by the builder of payments made to the city. Not being a finder of fact, I cannot opine regarding the applicability of the coercion exception. I further do not believe the city council’s after-the-fact adoption of an ordinance requiring the purchase of business permits might serve to ratify the city’s pre-ordinance imposition of the permit fees.

***Question 1: Did the City of Hampton have the authority to require a builder to obtain a builder’s permit and charge for such a permit prior to the time the city enacted an ordinance requiring a builder to obtain and to pay for a builder’s permit?***

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<sup>1</sup> I have not been provided a copy of this ordinance, and your summary consists only of the quoted passage. Although it is unclear what authority decided to impose the fees and whether the city required building permits before 1988, what matters for purposes of your question is solely whether the two fees at issue were legally imposed. For purposes of addressing this question, I will assume, in accordance with your summary, that the 2011 ordinance, not the 1988 ordinance, was the only legislative action in fact imposing building fees.

In my opinion, assuming the city indeed charged the fees and issued the permits before the enactment of the 2011 ordinance authorizing it to do so,<sup>2</sup> the answer to this question is “no.”

Before addressing the issue of whether a city can charge a fee for the issuance of a building permit without first having by ordinance authorized both the permit and the fee requirement, I must address whether, totally apart from the issue of timing, a city of the second class is even permitted independently to require building permits and to charge fees for their issuance.

In approaching this question, I am guided by the following pronouncement of the Arkansas Supreme Court:

Municipalities are creatures of the legislature and as such have only the power bestowed upon them by statute or by the Arkansas Constitution. *Jones v. American Home Life Ins. Co.*, 293 Ark. 330, 738 S.W.2d 387 (1987). *See also City of Ft. Smith v. O.K. Foods, Inc.*, 293 Ark. 379, 133 738 S.W.2d 96 (1987); *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). Additionally, this court has held that any substantial doubt concerning the existence of a power in a municipal corporation must be resolved against the City. *City of Little Rock v. Cash*, *supra*. Recently, this court summarized what powers can be exercised by a municipality:

Cities have no inherent powers and can exercise only (1) those expressly given them by the state through the constitution or by legislative grant, (2) those necessarily implied for the purposes of, or incident to, these express powers and (3) those indispensable (not merely convenient) to their objects and purposes.

*Cosgrove v. City of West Memphis*, 327 Ark. 324, 326, 938 S.W.2d 827, 828 (1997).<sup>3</sup>

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<sup>2</sup> You have attached to your request an unexecuted copy of City of Hampton Ordinance No. 2011-07, captioned “An Ordinance [sic] Establishing Building Permit Fees,” dated October \_\_\_\_, 2011.

<sup>3</sup> *Burke v. Elmore*, 341 Ark. 129, 131, 14 S.W.3d 172 (2000).

Except as regards certain exclusively “state affairs” not pertinent here, cities have been granted express authority to “perform any function and exercise full legislative power” related to matters “germane to, affecting, or concerning the municipality.”<sup>4</sup> This grant of authority includes the power to “[r]egulate the erection, construction, reconstruction, alteration, and repair of buildings.”<sup>5</sup> Requiring a building permit and charging a fee to offset the costs involved would appear to be “incidental,” if not necessarily “indispensable,” to the express regulatory power just recited.

The legislature’s grant of regulatory power over “the erection, construction, reconstruction, alteration, and repair of buildings” extends generally to “municipal corporations”<sup>6</sup> and hence would appear to apply to a city of the second class such as Hampton. However, the question of whether this regulatory power in a city of the second class includes the power to require a contractor to obtain a building permit may well be affected by a separate statute that provides in pertinent part:

(a)(1) The following *enlarged and additional powers* are conferred upon *cities of the first class*.

(2) *They shall have the power to:*

(A) Regulate the building of houses;

(B) *Provide that no house or structure shall be erected within the city limits except upon a permit to be issued by such officer as the city council shall designate;* and

(C) Provide that no permit shall be issued for the building of any house or structure deemed to be unsafe, unsanitary, obnoxious, or detrimental to the public welfare.<sup>7</sup>

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<sup>4</sup> A.C.A. §§ 14-43-601 and -602 (Supp. 2011).

<sup>5</sup> A.C.A. § 14-56-201 (Repl. 1998).

<sup>6</sup> *Id.*

<sup>7</sup> A.C.A. § 14-56-202 (Supp. 2011) (emphases added).

The highlighted portions of this subsection, which are contained in a statute immediately following the above recited general statute according municipalities authority to regulate construction, are striking in several respects. First, the subsection describes the powers listed as “enlarged and additional,” suggesting that they are not included in the immediately preceding statute generally applicable to all municipalities. Secondly, this subsection indicates that the “enlarged and additional powers” will extend only to “cities of the first class” – a category that does not include the City of Hampton. Finally, subsection (a)(2)(B) authorizes only municipalities falling within the scope of the statute – i.e., cities of the first class – to condition the erection of any structure within city limits upon the prior issuance of a permit by an officer appointed by the city council. This latter provision, read in conjunction with the earlier provisions, suggests that a city of the second class might be foreclosed altogether from issuing permits, not to mention from charging a substantial fee in connection with doing so.<sup>8</sup>

However, subsection (a) of the statute must be read in conjunction – and, if possible, reconciled – with the subsequently added subsection (b), which provides as follows: “However, the authority to appoint and remove department heads, including the building official, shall be governed by § 14-42-110 *regardless of the classification of the city or town.*”<sup>9</sup> (Emphasis added.) The highlighted phrase implies that a “building official” like other “department heads,” may be appointed in cities of the second class and in towns as well as in cities of the first class – an inference that supports a conclusion that building permits, and the attendant fees, may be required in any form of municipality.

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<sup>8</sup> This conclusion appears to follow from the following maxim set forth in *Gazaway v. Greene County Equalization Bd.*, 314 Ark. 569, 575, 864 S.W.2d 233 (1993): “The phrase *expressio unius est exclusio alterius* is a fundamental principle of statutory construction that the express designation of one thing may properly be construed to mean the exclusion of another.” *Chem-Ash, Inc. v. Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988); *Venhaus v. Hale*, 281 Ark. 390, 663 S.W.2d 930 (1946).

<sup>9</sup> A.C.A. § 14-56-202(b). The legislature added this subsection pursuant to Acts 2005, No. 943, § 1, which was apparently enacted in response to Ops. Att’y Gen. Nos. 2003-261 and 2003- 254, in which my immediate predecessor pointed out that the building official designated in the City of Cabot did not appear to qualify as a “department head” subject to appointment by the mayor pursuant to A.C.A. § 14-42-110. Unaccountably, in the course of identifying the “building official” as a “department head” to be appointed by the mayor, the legislature failed to repeal the provision in A.C.A. § 14-56-202(a)(2)(B) locating the power of appointment in the city council. In any event, the significant point for purposes of my current discussion is that the legislature further failed to indicate why its amendment of a statute that applied only to cities of the first class would apply to all classifications of municipality.

In addressing the apparent tension between A.C.A. §§ 14-56-201 and -202,<sup>10</sup> I am struck by the fact that, under the Arkansas Code, “[e]very municipality in the State of Arkansas,” without distinction as to category, “is authorized by the passage of a municipal ordinance to adopt by reference technical codes, regulations, or standards, without setting forth the provisions of the code or parts thereof . . . .”<sup>11</sup> Included among the “technical codes” to which this statute refers are “any building, zoning, health, electrical, or plumbing codes” – a category that clearly embraces the Standard Building Code contained within the Arkansas Fire Prevention Code (the “AFPC”) adopted by the City of Hampton.<sup>12</sup>

With regard to a city’s authority to impose a building permit requirement, the building code set forth in volume 2 of the AFPC contains the following pertinent provisions. Section 103.1 authorizes, but does not expressly require, “local jurisdictions” – a designation not qualified with respect to the class of particular cities – “to establish a department to be called the Building Department and the person in charge shall be known as the Building Official.” Subject to certain exceptions that do not apply to your question,<sup>13</sup> Section 105.1 charges any contractor before commencing construction to apply for a building permit either to the building official or, if none has been appointed, to the State Fire Marshal.

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<sup>10</sup> This tension was at issue in *Statewood Outdoor Advertising, LLC v. Town of Avaco*, 104 Ark. App. 10, 289 S.W.3d 111 (2008), in which the Arkansas Court of Appeals reversed a trial court’s dismissal, upon the Town of Avaco’s motion, of a complaint alleging that the town had exceeded its authority in attempting to block the erection of a billboard within town limits in violation of a town ordinance purporting to require a building permit to commence construction. Without itself addressing the merits of the complaint below, the appellate court held that the plaintiff had alleged sufficient facts to withstand the town’s motion to dismiss and hence remanded the case for further action. *Id.* at 14-15.

<sup>11</sup> A.C.A. § 14-55-207(a) (Supp. 2011).

<sup>12</sup> The 2007 AFPC consists of three volumes that incorporate slightly modified versions of the following model codes – the 2006 International Fire Prevention Code, the 2006 International Building Code and the 2006 International Residential Code. The AFPC was adopted by the Arkansas Fire Marshal pursuant to the authority granted him under A.C.A. § 12-13-105 (Repl. 2009). Being authorized by state law, the AFPC sets a minimum standard that is necessarily applicable to the state’s political subdivisions, regardless of whether it has been adopted by a city through ordinance. *See* Op. Att’y Gen. No. 2003-198 (opining that the most recent version of the AFPC has the force of state law and will apply to municipalities in all respects unless a municipality has adopted a more stringent standard); AFPC, Vol. 1, § 101.2.2 (2007 ed.) (“Each district, county, municipality or other political subdivision of this state shall only adopt and enforce the provisions of the *Arkansas Fire Prevention Code*, 2007 Edition.”); *accord* Ops. Att’y Gen. Nos. 2005-075 and 2003-198. In the present case, the city in Section 7 of the Ordinance purported to adopt the “1999 State Fire Code,” although it unaccountably referenced in the course of so doing “Code 2002.” Whatever the significance of this reference, the 2007 AFPC sets minimum standards applicable to the city.

<sup>13</sup> *Id.* at § 105.2.

With regard to the permissibility of imposing fees for the issuance of permits, Section 104.7 requires the building official to maintain a record of “fees collected.” Section 108.1 conditions the validity of any permit upon the payment of any “fees prescribed by law” and further conditions the release of any amendment to a permit upon the payment of “the additional fee, if any.”<sup>14</sup> Section 108.2 further provides that “on buildings . . . requiring a permit, a fee for each permit shall be paid as required, in accordance with the schedule as established by the applicable governing authority.” Section 108.3 provides that an applicant shall provide a “permit valuation” based upon the “total value of work, including materials and labor” – a formulation that suggests that the permit fee, if any, should be pegged to the value of the construction.

The foregoing suggests, then, that a building permit, whether issued by a building official or the state fire marshal, is required as a condition of construction in any local jurisdiction unless a recited exception applies. It further appears that a city may charge a fee for the issuance of a permit, possibly subject to the condition that the fee relate to the value of the permitted construction project in a reasonable way. Nothing in the AFPC indicates that the applicability of the permitting requirement and the fee authorization will hinge upon the class of city at issue in any given instance.

Given that a building official in any variety of city would have the permitting authority referenced in A.C.A. § 14-56-202(a)(2)(B) as applying in cities of the first class, it might be argued that the statute’s reference to “enlarged and additional powers” should not be read as intended to locate such permit-issuing authority *exclusively* in cities of the first class.<sup>15</sup> This conclusion draws support from the subsequent enactment of subsection (b) of the statute,<sup>16</sup> which potentially

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<sup>14</sup> With regard to whether “fees prescribed by law” might have been prescribed by city ordinance, *see* Op. Att’y Gen. No. 97-259 (opining that absent any contrary provisions of an applicable code, a city may impose a business-permit fee requirement). No provision of any code applicable on a statewide level mandates that any particular fee attach to the issuance of a business permit.

<sup>15</sup> This reading of the statute would accord with the principle that a reviewing court, in construing statutes, must give effect to every part, reconciling provisions to make them consistent, harmonious, and sensible.” *Omega Tube & Conduit Corp. v. Maples*, 312 Ark. 489, 493, 850 S.W.2d 317 (1993), citing *McGee v. Amorel Pub. Schools*, 309 Ark. 59, 827 S.W.2d 137 (1992) and *Shinn v. Heath*, 259 Ark. 577, 535 S.W.2d 57 (1976).

<sup>16</sup> *See* note 9, *supra*.

applies to any variety of municipality. It draws further support from various other statutes that appear to acknowledge that any municipality may condition construction within city limits upon obtaining a building permit.<sup>17</sup>

In response to the preliminary question posed above, then, although the Code would benefit from legislative clarification, it appears that a city of the second class like Hampton can, and perhaps must, require a contractor to obtain a building permit as a condition of construction.<sup>18</sup> It likewise appears that a city of the second class may charge a reasonable fee for the issuance of a building permit.

The remaining issue, which you have posed directly in your question, is whether the city was justified in enforcing these requirements before the city council had imposed them by ordinance. In my opinion, the answer to this question is “no.” In offering this answer, I consider it immaterial that the city council in 1988 reportedly voted to allow itself at some undesignated point in the future to enact an ordinance that would allow the collection of fees in conjunction with the issuance of building permits. In light of the considerations discussed above, I believe any vote authorizing the council to do what it was already empowered to do under state law was unnecessary and in no way equivalent to a vote actually imposing such requirements.

In my opinion, answering the question of whether the city could impose such requirements *only* by ordinance, as distinct from mere practice, turns on determining whether a city’s imposition of a building fee requirement would

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<sup>17</sup> See, e.g., A.C.A. §§ 14-56-417(c) (Repl. 1998) (providing that a zoning ordinance, which may be enacted by any variety of municipality, A.C.A. § 14-56-402 (Repl. 1998), “shall be observed through denial of the issuance of building permits and use permits”); 5-36-103(b)(2)(D)(ii)(b) (Supp. 2011) (in a statute dealing with theft of property, defining the term “permitted construction site” as meaning a site “for which a building permit has been issued by a city of the first class, a city of the second class, an incorporated town, or a county”); 26-26-707 (Repl. 1997) (“The city clerks of all cities and municipalities in each county shall prepare and file with the county assessor a list of all building permits issued each year.”); 17-25-301(b)(1) (Repl. 2001) (requiring that “the building inspector or other authority of any incorporated city or town in Arkansas charged with the duty of issuing building or other permits for the construction of any building” issue a permit for construction exceeding \$20,000 in cost only upon a showing that the contractor is duly licensed); 14-172-208(a)(1) (Repl. 1998) (requiring any municipality to apply for a certificate of appropriateness before issuing a building permit to undertake any construction within an historic district).

<sup>18</sup> I note in this respect that a number of cities of the second class have in fact appointed building officials whose duties presumably include the issuance of building permits.

constitute an action of a “general or permanent nature.” If it would, then the measure must be enacted in the form of an ordinance subject to certain formalities.

As noted by one of my predecessors:

Measures of a “general or permanent nature” are considered ordinances and must be read on three different days pursuant to A.C.A. § 14-55-202, unless the rule is dispensed with. Such ordinances must also be properly recorded and authenticated (A.C.A. § 14-55-205), and they must be published in accordance with A.C.A. § 14-55-206.<sup>19</sup>

The test for whether a measure is “general or permanent” has been expressed as follows:

Of course, all ordinances enacted by city councils are not permanent in the sense that they cannot be repealed; but those which endure until repealed are deemed to be permanent, and all others are not permanent. Ordinances of a general nature are those which are general and uniform in their application.<sup>20</sup>

In my opinion, a municipal scheme conditioning construction upon the issuance of a building permit and the payment of a fee is “general and permanent” under the above standard and hence must be enacted by ordinance subject to the appropriate formalities. Accordingly, I believe any enforcement of such a requirement would be inappropriate in the absence of an ordinance.

***Question 2: If the city had no such authority, does the city have the legal obligation to remit the costs of the building permits back to the builder and, ultimately, back to the Hampton School District?***

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<sup>19</sup> Op. Att’y Gen. No. 2002-260.

<sup>20</sup> *City of El Dorado v. Citizens’ Light & Power Co.*, 158 Ark. 550, 555, 250 S.W. 882 (1923). *See also Adams v. Sims*, 238 Ark. 696, 385 S.W.2d 13 (1964) (holding that an urban renewal plan was neither general nor permanent because it did not encompass the whole city and was effective only for a term of twenty years); *City of Fort Smith v. O.K. Foods, Inc.*, 293 Ark. 379, 738 S.W.2d 96 (1987).

I cannot definitively answer this question, which requires review by a finder of fact applying what at common law is known as the “voluntary payment rule.” The Arkansas Supreme Court has offered the following analysis of this rule:

We have described the common-law rule as follows:

Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release (not to avoid) his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary.

*City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). We follow this rule even when an illegal-exaction claim is based on constitutional grounds. . . .

In *Mertz v. Pappas*, 320 Ark. 368, 896 S.W.2d 593 (1995), we explained the rationale behind the voluntary-payment rule. Specifically, we explained:

When taxes are paid to a government they are deposited into that government’s general revenues and ordinarily are spent within that tax year. However, when the government is put on notice that it may be required to refund those taxes, it can make the appropriate allowance for a possible refund. If we were to allow refunds for taxes voluntarily paid in previous years, it would jeopardize current and future governmental operations because current and future funds might be necessary for the refund.

*Id.* (internal citations omitted).

The general rule is that taxes paid before litigation commences are voluntary, while payments made after litigation has commenced are involuntary. Our case law suggests that another exception to the

voluntary-payment rule may be sustained if the payments were made under coercion. *Id.* In *Chapman & Dewey Land Co. v. Board*, 172 Ark. 414, 288 S.W. 910 (1926), we discussed this exception:

The coercion which will render a payment of taxes involuntary must consist of some actual or threatened exercise of power possessed by the party exacting or receiving payment over the person or property from which the latter has no reasonable means of immediate relief except by making payment.

*Id.* We have applied this exception in several cases. *See Paschal v. Munsey*, 168 Ark. 58, 268 S.W. 849 (1925); *White River Lumber Co. v. Elliot*, 146 Ark. 551, 226 S.W. 164 (1920). The coercion in these cases was that of an immediate loss of property if the taxes were not paid.<sup>21</sup>

A business license fee, although not a tax of the sort at issue in the passage just recited, is nevertheless a governmental charge that, if deemed unlawful, would constitute an illegal exaction by a branch of government. It is further clearly a payment to government falling within the policy rationale set forth above, whereby a government is spared having to reimburse voluntary payments that it may already have spent on the assumption, whether warranted or not, that the charges were legitimate.<sup>22</sup> It would thus appear that, assuming no litigation was filed prior to the making of the payments at issue, the voluntary payment rule would bar recovery of the fees paid unless the recited coercion exception to the rule applied. Not being a finder of fact, I am not situated to determine the potential applicability of this exception.

Your question further raises an issue regarding whether the city council's eventual adoption of an ordinance requiring the purchase of building permits might be deemed a ratification of the pre-ordinance enforcement of a permit and fee

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<sup>21</sup> *Weiss v. Chavers*, 357 Ark. 607, 614-15, 184 S.W.3d 437 (2004).

<sup>22</sup> Having thus focused on the role of the government as actor, I must note that the voluntary payment rule can apply even in the absence of government involvement, meaning that the applicability of the rationale recited by the court in the passage just quoted is not in itself crucial to the application of the rule. *See, e.g., Boswell v. Gillett*, 226 Ark. 935, 940-41, 295 S.W.2d 758 (1956) (declaring that the voluntary payment rule would apply if a tenant partner were to pay full rent without demanding needed repairs).

requirement. One of my predecessors, in likewise considering the authority of a city's governing body, has summarized the concept of ratification as follows:

It is well-established that a municipal corporation may ratify the unauthorized acts of its officers which are within the scope of the corporate powers. *See generally Day v. City of Malvern*, 195 Ark. 804, 807, 114 S.W.2d 459 (1938); *Lykes v. City of Texarkana*, 223 Ark. 287, 265 S.W.2d 539 (1954); *McQuillin Mun. Corp.* § 13.47 (3rd ed.). Although a city council cannot legally confirm or ratify *ultra vires* acts (beyond the scope of authority) or acts under a void law, it can generally ratify what it could previously have lawfully authorized. *McQuillin, supra*.<sup>23</sup>

I have recently noted of this concept:

The premise underlying the doctrine of ratification appears to be that whereas a city's governing body can ratify after the fact an action that would have been valid had it initially been taken with the requisite approval, the governing body cannot ratify an action that it could not have undertaken or approved in the first instance.<sup>24</sup>

In my opinion, the operative question in applying this principle is not whether the city council might in the past itself have imposed by ordinance and collected a business permit fee. Rather, it is whether the city council might in the past itself have required the purchase of a business permit when no such requirement had been authorized by ordinance. The controlling premise is that a citizen cannot be held to observe a law that could not have been enforced by any authority because no such law was then in existence. Stated in terms of my predecessor's earlier formulation, it would not be "within the scope of the corporate powers" for any municipal entity, including the city council itself, to collect a fee for a business permit that was not authorized by ordinance. Consequently, I do not believe the doctrine of ratification applies in this case.

Finally, I consider it purely a question of contract law whether the school district might recover from the builder any business permit expenses the builder might recover from the city. Any dispute about such a recovery is a matter for a court to

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<sup>23</sup> Op. Att'y Gen. No. 91-289; *accord* Op. Att'y Gen. No. 2011-130.

<sup>24</sup> *Id.*

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resolve. Again, I am not a finder of fact and consequently cannot take a position on this issue.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh