

Opinion No. 2012-021

May 21, 2012

Bryan L. Chesshir, Esq.
Prosecuting Attorney
Ninth Judicial District-West
122 West Bishop
Post Office Box 158
Nashville, Arkansas 71852

Dear Mr. Chesshir:

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

Would an appropriation of county funds by the Howard County Quorum Court to the Mine Creek Conservation District be a violation of Article 12 Section 5 of the Arkansas Constitution?

As background, you have offered the following:

The Mine Creek Conservation District, created under the Arkansas Code Annotated Title 14, Chapter 125, Section 101 et seq. seems to indicate that the conservation district is NOT a corporation, association, institution or individual, and would, therefore, be eligible to receive county funds IF, the county court finds that the benefits accruing to the county by reason of the program of a conservation district justify the action.

However, the Arkansas Constitution, Article 12 Section 5, provides that “No county, city, town or other municipal corporation, shall become a stockholder in any company, association, or corporation, or obtain of [sic: ‘or’] APPROPRIATE [emphasis yours] money for, or loan its credit to, any corporation, association, institution or individual.”

RESPONSE

In my opinion, a reviewing court would likely conclude that neither Ark. Const. art. 12, § 5 nor any other provision of law precludes the Howard County Quorum Court from appropriating to the Mine Creek Conservation District (the “District”) any county funds that are not dedicated to another purpose.

As you point out in your request, Ark. Const. art. 12, § 5 provides in pertinent part that “[n]o county . . . shall . . . appropriate money for . . . any corporation, association, institution or individual.” You appear concerned that, notwithstanding the fact that the Arkansas Code expressly contemplates a county’s contributing to a conservation district, a quorum court might nevertheless run afoul of the constitutional proscription if it appropriates funds for conservation-district use. In my opinion, this concern is in all likelihood unfounded.

You indicate in your statement of background facts that the District was formed pursuant to the Conservation Districts Law (the “Act”),¹ which authorizes the formation of a conservation district as “a governmental subdivision of this state and a public body, corporate and politic.”² In accordance with these designations, any conservation district is recognized as “exercising public powers.”³ The scope of these authorized powers is reflected in the following statement of legislative policy:

It is declared to be the policy of the General Assembly to provide for the control and prevention of soil erosion, for the prevention of flood-water and sediment damages, and for furthering the conservation, development, and utilization of soil and water resources and the disposal of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, assist in the control of nonpoint source pollution, protect the tax base, protect public lands, and protect and

¹ A.C.A. § 14-125-102 through -907 (Repl. 1998 & Supp. 2011), originally enacted pursuant to Acts 1937, No. 197.

² A.C.A. §§ 14-125-106(1), -206(b) and 303(a).

³ A.C.A. § 14-125-303(a).

promote the health, safety, and general welfare of the people of this state.⁴

With regard to the permissibility of a county’s funding the operations of a conservation district, the Act provides in pertinent part:

c) In the event the county court finds that the benefits accruing to the county by reason of the program of a conservation district justify the action, it may make donations to the district of money, services, or the use of equipment.

(d) The directors of those districts desiring county assistance shall make application therefor to the county judge and in such form as he may prescribe.

(e) The quorum courts of the respective counties of the state are authorized and empowered to appropriate annually an amount as may be deemed necessary for such purposes.⁵

The statement of background facts recited above reflects your concern that there might be a tension between this legislative grant of authority to a quorum court to appropriate funds for the benefit of a conservation district and the constitutional proscription under Article 12, § 5 against a quorum court’s appropriating money for “any corporation, association, institution or individual.” In this regard, I should note initially that the legislation just recited is presumed constitutional.⁶ In my opinion, this presumption would in all likelihood withstand any challenge based upon the provisions of Article 12, § 5.

In the attached Attorney General opinion,⁷ one of my predecessors reviewed in detail the Arkansas Supreme Court’s pronouncements over time regarding the permissibility of a local political subdivision’s funding various private, quasi-public and public organizations in light of the strictures of Article 12, § 5. I will

⁴ A.C.A. § 14-125-105.

⁵ A.C.A. § 14-125-307 (emphasis added).

⁶ *Paschal v. State*, 2012 Ark. 127, 81 (“Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute.”).

⁷ Op. Att’y Gen. 1999-408. *See also* Op. Att’y Gen. 2005-205.

not here repeat my predecessor’s analysis, to which I fully subscribe. I will, however, repeat his conclusions regarding the propriety of a local government’s providing financial support that has been expressly authorized by the General Assembly:

[A]ny use of county moneys for charitable purposes may well pass constitutional muster if the use serves a public purpose or achieves a governmental function, so long as the recipient can be characterized as “public.” . . . As the law currently stands, there appears to be some element of fiat in the Supreme Court’s pronouncements regarding what pledges of municipal or county funds will be permitted. *As established in McCutchen*,^[8] ***it is clearly permissible, for instance, to contribute to a facilities board, which, despite not being a straightforward municipal agency, has a statutory pedigree and has been identified as a category of entity beyond the contemplation of article 12, § 5.*** In the wake of *Venhaus*,^[9] however, it is clearly impermissible to contribute to a private nonprofit corporation like the AIDC. Perhaps the most that can be said is that ***if an entity is authorized by statute and is not organized as a private nonprofit corporation, and especially if the donations themselves are authorized by statute, a donation of county or municipal funds may be constitutional.*** These principles reflect a clear move by the Court to reassert that public moneys may only be put to public use.¹⁰

In all material respects, the situation you describe with respect to the District closely approximates, although it does not quite match, the situation at issue in *McCutchen*. In the course of approving a county’s financial support of a facilities board, the court in *McCutchen* offered the following analysis:

In *City of Paris v. Street Improvement Dist. No. 12*, 206 Ark. 926, 175 S.W.2d 199 (1943), this court explained that city improvement districts were not “companies, associations, or corporations” as

⁸ *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997).

⁹ *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990) (directing that residuals remaining from an illegal exaction be distributed *pro rata* to the affected governmental entities to be used for “general municipal services” rather than distributed, *inter alia*, to private nonprofit charitable corporations).

¹⁰ Op. Att’y Gen. 1999-408 (emphases added; emphasis in original deleted).

contemplated by Article 12, Section 5, but instead were the “municipality acting through an agency of its own creation.” Likewise, facilities boards are not the type of company, association, or corporation contemplated by Article 12, Section 5. Rather, facilities boards are agencies created by the counties to carry out various county activities. Therefore, we also affirm the chancellor’s ruling on this point.¹¹

A conservation district formed under the Act is not a creature of the county as was the facilities board in *McCutchen*. Rather than being formed by action of the county itself, a conservation district is formed by petition to the Arkansas Soil and Water Conservation Commission by the owners of property located within the proposed district.¹² Nevertheless, as discussed above, a conservation district is a governmental entity authorized by statute, serving a clear public purpose and legislatively approved to receive funds appropriated by the county in which the district is located. Under these circumstances, I consider it quite likely that a court faced with the issue would conclude that a conservation is not a “corporation,” “association” or “institution” subject to the proscriptions of Article 12, § 5. Accordingly, there would not appear to be any prohibition against the Howard County Quorum Court’s appropriating funds to support the Mine Creek Conservation District.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosure

cc: Deputy Prosecuting Attorney Daniel Graves

¹¹ 328 Ark. at 213.

¹² A.C.A. § 14-125-201(a).