

Opinion No. 2012-051

August 16, 2012

The Honorable David Wyatt
State Senator
159 Wyatt Lane
Batesville, Arkansas 72501

Dear Senator Wyatt:

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

1. Can a municipality/city legally pay for satellite or cable television services to be provided at city buildings or departments such as fire and police stations?
2. If the answer is yes, can the funds come from tax revenue or should another source of revenue be used?

You have provided the following factual background:

A fire station in my Senate district was previously provided cable television by a private cable company at no cost to the city. The firefighters used the cable television services for news, weather (the fire department is solely responsible for activating the city's emergency warning sirens) and entertainment in the evening and off hours. The cable company has ceased operations in the city and the fire station lost the free service. The fire department has installed a satellite dish and the firefighters are paying for the television service themselves.

RESPONSE

With respect to your first question, in my opinion, providing satellite or cable television services to a city building or department at public expense is permissible if the services fulfill a legitimate public purpose. Only a finder of fact acquainted with all the surrounding circumstances could determine whether this test had been met in any particular instance. Subject to this qualification, however, I believe that a reviewing court might well deem it within the discretion of agency heads and authorized city officials to provide basic news and weather cable service to various city facilities, including perhaps most prominently such offices as fire departments, law enforcement agencies and first responders. With respect to your second question, assuming the test just described were met, I believe it would be permissible to provide the services using either general tax revenues or tax revenues expressly dedicated to this purpose.

Question 1: Can a municipality/city legally pay for satellite or cable television services to be provided at city buildings or departments such as fire and police stations?

Determining the propriety of any such payment will in each instance entail applying various constitutional, statutory and common law provisions relating to the expenditure of public funds. I consequently cannot opine generally that the provision of cable service to all “city buildings or departments” will invariably withstand challenge. I will opine, however, that a litigant would be unlikely to prevail in a challenge to the provision at public expense of a service that provides news and weather cable access to such entities as fire and police departments or first responder services. In offering this opinion, I consider it immaterial that the satellite or cable service providing such access might include commercial channels that do not provide such information. A court would more likely uphold a challenge, however, to the publicly financed provision to city buildings or departments of any additional paid entertainment package offered by a satellite or cable provider.

The analysis of a municipal expenditure in any particular case will turn upon whether it serves a proper “public purpose” as that term applies to municipalities under (1) the common-law public purpose doctrine; (2) the statutory restrictions of A.C.A. § 14-58-303 relating to purchases and contracts; and, (3) if applicable, the constitutional restriction set forth in Ark. Const. art. 12, § 5. I will briefly review

these standards before discussing their application within the specific context of your question.

As its name implies, the common-law “public purpose doctrine” restricts public expenditures to those that serve primarily public purposes, with any benefit to a private individual or entity being merely incidental. One of my predecessors has aptly summarized this doctrine as follows:

[T]he broad, but often difficult to define “public purpose” doctrine . . . generally requires that the expenditure of public funds be for a “public purpose.” *See generally Chandler v. Board of Trustees of the Teacher Retirement System of the State of Arkansas*, 236 Ark. 256, 365 S.W.2d 447 (1963). . . . It has been stated as regards this doctrine that “[n]o expenditure can be allowed legally except in a clear case where it appears that the welfare of the community and its inhabitants is involved and direct benefit results to the public.” McQuillin, *Municipal Corporations*, § 12, 190. The determination of whether a particular expenditure is for a “public purpose” is to be made by the legislature. Although ultimately the propriety of a particular expenditure is resolved by the judiciary, great weight must be given legislative declarations of public purposes. *Turner v. Woodruff*, 286 Ark. 66, 689 S.W.2d 527 (1985).¹

Certain restrictions apply to any *local* legislative acts purporting to define and to fulfill a requisite “public purpose.” These restrictions flow directly from the accepted premise that all local governmental authority is derivative. In this regard, the Arkansas Supreme Court has articulated the following general principles:

Municipal corporations are creatures of the legislature and as such have only the power bestowed upon them by statute or the Arkansas Constitution. . . . It is well settled that municipal corporations have no inherent powers and can exercise only (1) those expressly given to them by state statute or the Arkansas Constitution, (2) those necessarily implied for the purposes of, or incident to, the express powers, and (3) those indispensable, not merely convenient, to their objects and purposes. . . . Finally, any substantial doubt about the

¹ Op. Att’y Gen. No. 91-410.

existence of a power in a municipal corporation must be resolved against it.²

The authority expressly delegated to cities includes both the general power to act concerning municipal affairs and the related “police power.” With respect to the first of these powers, the General Assembly has authorized cities to enact provisions concerning municipal affairs, provided that they do not conflict with state law.³ “Municipal affairs” comprise “all matters and affairs of government germane to, affecting, or concerning the municipality or its government,” with the exception of certain designated “state affairs.”⁴ Any ordinance enacted in the exercise of this power will be entitled to the same presumption of validity as is a state legislative enactment,⁵ meaning that the ordinance will be presumed to fulfill a public purpose.

With respect to the second of these powers, the General Assembly has delegated to cities the following authority:

Municipal corporations shall have the power to make and publish bylaws and ordinances, not inconsistent with the laws of this state, which, as to them, shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof.⁶

² *White County v. Cities of Judsonia, Kensett and Pangburn*, 369 Ark. 151, 155-56, 251 S.W.3d 275 (2007) (citations omitted).

³ See A.C.A. §§ 14-43-601 and -602 (Supp. 2011) (cities can exercise legislative power over “municipal affairs”); 14-42-307 (Repl. 1998) (cities can exercise all powers conferred by state law that are “not contrary” to state law); 14-54-101 (Repl. 1998) (cities can exercise powers that are “not inconsistent” with the general laws of the state); 14-55-101 (Repl. 1998) (cities can enact ordinances that are “not inconsistent with the laws of the state”); 14-43-502 (Supp. 2011) (city councils in cities of the first class have legislative power granted by state law and “not prohibited by it”).

⁴ See A.C.A. § 14-43-601 (Supp. 2011).

⁵ *Harris v. City of Little Rock*, 344 Ark. 95, 104, 40 S.W.3d 214 (2001).

⁶ A.C.A. § 14-55-102 (Repl. 1998).

This delegated authority, which is generally known as the “police power,”⁷ is one whose exercise the Arkansas Supreme Court has characterized as a “duty” that a city must fulfill in the service of the public welfare:

Municipal corporations derive their legislative powers from the general laws of the state. Ark. Const. art. 12, § 4. . . . [W]e [have] recognized *the city’s plenary duty to exercise its police power in the interest of the public health and safety of its inhabitants. . . . The police power of the state is founded in public necessity and this necessity must exist in order to justify its exercise. . . . It is always justified when it can be said to be in the interest of the public health, public safety, public comfort. . . .* The State has authorized the municipalities to legislate under the police power in Ark. Code Ann. § 14-55-102 (1987).

* * *

[J]udicial review of a legislative enactment is limited to determining whether the legislation is arbitrary, capricious, and unreasonable. . . . *The legislation is not arbitrary if there is any reasonable basis for its enactment.*⁸

The passage just quoted is striking in several respects. First, invoking the legislature’s express delegation of police power to the cities, the court characterizes as founded in “public *necessity*” any municipal action that “can be said to be in the interest of the public health, public safety, [and] public comfort.” In this regard, the Arkansas Supreme Court has further pointed out that any ordinance based upon a city’s general police powers need only “*bear some reasonable relation* to the public health, safety, morals, welfare” – i.e., “to any of these *essential requirements necessary* to the exercise of police powers.”⁹ The conflation of the highlighted terms is noteworthy in that it acknowledges that any

⁷ See *Phillips v. Town of Oak Grove*, 333 Ark. 183, 189, 968 S.W.2d 600 (1998) (“The State has authorized the municipalities to legislate under the police power in Ark. Code Ann. § 14-55-102 (1987).”). This statute defining the scope of the police powers is also popularly termed the “general welfare clause.” See *City of Fort Smith v. Van Zandt*, 197 Ark. 91, 94, 122 S.W.2d 187 (1938).

⁸ *Phillips v. Town of Oak Grove*, 333 Ark. 183, 189-90, 968 S.W.2d 600 (1998) (emphases added).

⁹ *Wilkins v. City of Harrison*, 218 Ark. 316, 320, 236 S.W.2d 82 (1951) (emphases added).

municipal action reasonably related to the ends defined in the police power statute will be deemed “essential” and “necessary” and hence be permissible. Secondly, the above quoted passage acknowledges the liberal standard of judicial review of municipal legislation, under which any ordinance is presumed valid and will be upheld “if there is any reasonable basis for its enactment.”

My predecessors have on various occasions noted the wide discretion afforded local officials to determine proper public purposes.¹⁰ The scope of this discretion is reflected in the following hornbook summation:

The court will give weight to a legislative determination of what is a municipal purpose. It has been laid down as a general rule that the question of whether the performance of an act or the accomplishment of a specific purpose constitutes a “public purpose” for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter’s exercise of judgment or discretion is shown to have been unquestionably abused.¹¹

Further bearing upon your question is the application of A.C.A. § 14-58-303(a) (Supp. 2011), which provides as follows:

In a city of the first class, city of the second class, or incorporated town, the mayor or the mayor’s duly authorized representative shall have exclusive power and responsibility to make purchases of all supplies, apparatus, equipment, materials, and other things requisite for public purposes in and for the city and to make all necessary contracts for work or labor to be done or material or other necessary things to be furnished for the benefit of the city, or in carrying out any work or undertaking of a public nature in the city.

This statute, which would clearly apply to a municipal contract to provide cable television access to city buildings and departments, is in all respects consistent with more general statutes granting municipalities the authority to enter into

¹⁰ See, e.g., Ops. Att’y Gen. Nos. 94-397 and 92-179.

¹¹ 64A CJS *Municipal Corporations*, § 1573(b), at 99 (footnotes omitted).

contracts that relate to municipal affairs.¹² In its focus on the provision of goods and services “requisite for public purposes” and on “any work or undertaking of a public nature,” this statute marks the legislature’s acknowledgment of the public purpose doctrine, which will apply through exercise of the police power in the manner discussed above.

As noted above, Ark. Const. art. 12, § 5 might under certain circumstances foreclose a municipal expenditure. This constitutional proscription provides in pertinent part: “No county, city, town or other municipal corporation, shall . . . obtain or appropriate money for . . . any corporation, association, institution or individual.” One of my predecessors reviewed in detail the historical application of Article 12, § 5 – an analysis with which I fully concur – glossing the literal text just quoted only to the extent of acknowledging that certain types of entities display characteristics that warrant classifying them as “public” and hence eligible to receive funds from a political subdivision so long as any such grant of funds “serves a public purpose or achieves a governmental function.”¹³ What matters in determining the applicability of Article 12, § 5, however, is not whether a given expense serves a public purpose; rather, premised on the established assumption that any public expenditure must serve a public purpose, this particular constitutional provision focuses exclusively on the requirement that the recipient be “public” in a way that removes him or it from the list of proscribed recipients set forth in the constitutional text.

In my opinion, the proscription set forth in Article 12, § 5 would not apply under the circumstances set forth in your specific question. A city’s “buildings or departments such as fire and police stations” indisputably qualify as “public” under the standard just discussed – a fact that in itself locates the pertinent inquiry outside the bounds of Article 12, § 5. At issue is only whether the individuals who access the “satellite or cable television services” are doing so in an official – i.e., a “public” – capacity. This analytically distinct question does not implicate Article 12, § 5, raising instead a question regarding the scope of the public purpose doctrine itself.

You specifically describe in your background information the situation of a fire station subscribing to cable television, apparently subject to a municipal contract,

¹² A.C.A. §§ 14-54-101(2) and 14-42-307(a)(1) (Repl. 1998). *See also* discussion in Op. Att’y Gen. No. 2000-147 (generally discussing the scope of a city’s authority to contract).

¹³ Op. Att’y Gen. No. 1999-408; *accord* Op. Att’y Gen. No. 2005-205.

“for news, weather (the fire department is solely responsible for activating the city’s emergency warning sirens) and entertainment in the evening and off hours.” A finder of fact could conclude that if the subscription serves the city’s emergency warning system, it should be deemed “necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience” of the city and its inhabitants.¹⁴ As noted above, to the extent that such an expenditure bears a “reasonable relationship” to the ends defined under the police power, it might well be deemed justified.¹⁵

Moreover, depending upon the type of job involved, a reviewing court might conclude that providing some diversion, even in the form of entertainment, to on-duty personnel who are not – and, indeed, could not be – immediately engaged in official activities is in itself a permissible expenditure of public funds. This conclusion might be deemed appropriate, for instance, in the case of a municipal fire department, whose employees presumably are “on duty” during protracted periods of relative inactivity. In my opinion, a court might reasonably conclude that it would serve the public interest to provide on-duty employees a reasonable means to occupy their time during such periods.

In addressing a specific challenge, a court will be bound to apply the liberal standard of review set forth above, pursuant to which a municipal government’s determination regarding a particular expenditure will be accorded deference so long as it bears a “reasonable relationship” to the ends whose achievement the legislature has assigned to local control. I will note, in this regard, that ready access to information is a generally acknowledged requirement in various governmental offices – a reality that may well account for the fact that cable access is far from an anomaly in governmental operations. I must stress again, however, that the funding of such access in any particular case will be subject to a fact-intensive review, not reflexive approval or rejection. I can do no more than set forth the standard to be applied in considering this question.

Question 2: If the answer is yes, can the funds come from tax revenue or should another source of revenue be used?

¹⁴ See note 6, *supra* and accompanying text.

¹⁵ See note 8, *supra* and accompanying text.

Assuming that a finder of fact were to conclude that a municipality is authorized in a particular instance to pay for cable service to a city building or department, I believe the funds to pay for that service might come either from general tax revenues available on an unrestricted basis for municipal purposes or from tax revenues expressly dedicated to that purpose.

Cities are expressly afforded the power to impose taxes pursuant to Ark. Const. art. 12, § 4.¹⁶ In accordance with this provision, the Arkansas Code provides as follows:

(a)(1) In addition to all other authority of local governments to levy taxes provided by law, . . . any municipality acting through its governing body may levy any tax not otherwise prohibited by law.

(2) However, no ordinance levying an income tax authorized by this subchapter or any other tax not authorized shall be valid until adopted at a special or general election by the qualified electors of the city¹⁷

As the Arkansas Supreme Court has noted:

Taxes are enforced burdens exacted pursuant to statutory authority. Municipal taxes are those imposed on persons or property within the corporate limits, to support the local government and pay its debts and liabilities, and they are usually its principal source of revenue.¹⁸

Although Ark Const. art. 16, § 11 provides that “every law imposing a tax shall state distinctly the object of the same,” it is well established that a tax enacted or approved by the people without a statement of purpose is valid and may be

¹⁶ *Accord English v. Oliver*, 28 Ark. 317 (1873) (acknowledging that a political subdivision of the state may tax its citizens pursuant to authority granted by the state).

¹⁷ A.C.A. § 26-73-103. The levy of any municipal income tax or other tax not expressly authorized is permissible under this statute only if the tax is approved at an election. *Id.* See *City of North Little Rock v. Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983) (ruling that a “public safety fee” assessed on municipal water bills to fund salary increases for police and firemen was in fact a tax subject to voter approval).

¹⁸ *Graham, supra*, at 548-49.

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appropriated for any general purpose.¹⁹ It follows that a tax may be put to any purpose expressly approved by the voters or, if general in nature, to any purpose consistent with the principles discussed in my response to your previous question. If the provision of cable television service to a city building were deemed consistent with these principles, nothing would preclude funding such service using tax revenues.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

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¹⁹ *Western Foods, Inc. v. Weiss*, 338 Ark. 140, 150-51, 992 S.W.2d 100 (1999); *Oldner v. Villines*, 328 Ark. 296, 305, 943 S.W.2d 574 (1997).