

Opinion No. 2012-060

August 23, 2012

The Honorable John Catlett  
State Representative  
11732 West Highway 28  
Rover, Arkansas 72860-8013

Dear Representative Catlett:

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

1. May a school district sell, donate or lease abandoned buildings and property to non-profit organizations, private enterprise, government entities or others?
2. If a school district has a building or property, on which it has an indebtedness, but which is no longer being utilized by the school, may the school sell, donate or lease that property or building?

You have noted the following background information:

Due to the recent school consolidations throughout the state, many buildings have been abandoned and the cost of maintaining or razing the buildings falls upon the school district.

**RESPONSE**

I cannot provide a general answer to your first question. Various conditions may apply to the disposition of unused school district property, consisting primarily of restrictions upon the nature of the recipient and the uses to which the property may be put. I will address these conditions in the text of my discussion. With respect to your second question, the fact that unused school property is encumbered by

debt will not affect the permissibility under current law of the contemplated transactions. The effect of the indebtedness in any given transaction will be controlled in each case by applicable principles of standard contract and property law. Only a finder of fact can determine the legal implications of an encumbrance on property in any particular case.

***Question 1: May a school district sell, donate or lease abandoned buildings and property to non-profit organizations, private enterprise, government entities or others?***

I cannot answer this question with a simple “yes” or “no.” The ensuing discussion will set forth the circumstances under which a school district may dispose of unused real property in any of the manners recited.

Circumscribing any inquiry regarding the conveyance of school district realty are the constitutional directives that “the State shall ever maintain a general, suitable and efficient system of free public schools”<sup>1</sup> and that no tax levied to support a school district “shall be appropriated for any other purpose nor to any other district than that for which it is levied.”<sup>2</sup> Also bearing on any such inquiry is the related statutory directive that a school board “[do] all . . . things necessary and lawful for the conduct of efficient free public schools in the district.”<sup>3</sup> As this office has repeatedly noted, school districts boards have broad discretion in operating their districts in fulfillment of these ends. As one of my predecessors has noted:

The Arkansas courts have long interpreted this statute [A.C.A. § 6-13-620, which defines a school district board’s powers] as allowing school boards wide latitude in governing their districts. *See, e.g., Safferstone v. Tucker*, 235 Ark. 70, 72, 357 S.W.2d 3, 4 (1962); *Isgrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946). *See also Springdale Board of Education v. Bowman*, 294 Ark. 66, 69, 740 S.W.2d 909, 910 (1987); *Leola School District v. McMahan*, 289 Ark. 496, 498, 712 S.W.2d 903, 905 (1986). The courts have further held that they will not substitute their judgment for that of a school

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<sup>1</sup> Ark. Const. art. 14, § 1.

<sup>2</sup> Ark. Const. art. 14, § 3.

<sup>3</sup> A.C.A. § 6-13-620(a)(12).

board with regard to policy matters, unless the school board, in enacting the policy in question, abused its discretion or acted arbitrarily, capriciously, or contrary to law. *Id.* The court in *Leola, supra*, explained “arbitrary and capricious” action by a school board as being action that is not supportable “on any rational basis.” *Leola*, 289 Ark. at 498, 712 S.W.2d at 905. It should be noted that the party challenging the school board’s policy has the burden of proving the board’s abuse of discretion by clear and convincing evidence. *Springdale*, 294 Ark. at 69, 740 S.W.2d at 910.<sup>4</sup>

In *Safferstone*, the Arkansas Supreme Court offered the following summary of the discretion that resides in a school district board of directors:

The law involved appears to be well settled. In this State a broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence. *White v. Jenkins*, 213 Ark. 119, 209 S.W.2d 457; *Merritt v. Dermott Special School Dist.*, 188 Ark. 243, 65 S.W.2d 33; *Connelly v. Earl Frazier Sp. School Dist.*, 167 Ark. 49, 266 S.W. 929; *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538; *State v. School Dist. No. 16*, 154 Ark. 176, 242 S.W. 545.<sup>5</sup>

Among the statutory powers afforded school districts is that of “[b]uying, selling, renting, and leasing real property . . . on behalf of the school district.”<sup>6</sup> Specifically with respect to the sale of properties in the wake of a consolidation of the sort that has reportedly prompted your questions, the Arkansas Code provides in pertinent part:

(a) A school district in the State of Arkansas that is consolidated with one (1) or more school districts may:

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<sup>4</sup> Ark. Op. Att’y Gen. No. 2000-270.

<sup>5</sup> *Safferstone, supra*, 235 Ark. at 72.

<sup>6</sup> A.C.A. § 6-13-620(6)(E) (Supp. 2011).

(1) Sell buildings or lands owned by the school district that are no longer used by the school district; or

(2) Preserve buildings or lands owned by the school district that are no longer used by the school district.

(b) If the school district sells or otherwise disposes of a building or land to a person or entity under this section, then:

(1) The school district shall have the right of first refusal to purchase or otherwise reacquire the real property if the person or entity decides to sell the real property; and

(2) The sale price of the real property when repurchased or otherwise reacquired by the school district shall not:

(A) Exceed the price that the person or entity paid the school district for the property; and

(B) Include compensation for any improvements to the property.<sup>7</sup>

This statute does not qualify to whom the property may be sold and thus authorizes a sale of the property to any of the entities contemplated in your question.

A school district is further authorized to sell or to lease its real property, apparently to any entity, pursuant to the above quoted A.C.A. § 6-13-620(6)(E), which expressly authorizes such transactions “on behalf of the school district.”<sup>8</sup> The qualifying phrase “on behalf of” must be read in light of the statutory mandate, which accords with constitutional priorities, that any board action promote “the conduct of efficient free public schools in the district.”<sup>9</sup>

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<sup>7</sup> A.C.A. § 6-13-111 (Repl. 2007).

<sup>8</sup> Compare A.C.A. § 14-16-105(d)(1) and -105(e)(1) (Supp. 2011) (mandating that county real and personal property may be sold for a price not less than 3/4 of its appraised value); A.C.A. § 14-54-301 (Repl. 1998) and -302 (Supp. 2011) (authorizing municipalities to sell their real estate, presumably for both monetary and nonmonetary consideration).

In my opinion, the propriety of any such sale would be conditioned upon the consideration received being adequate<sup>10</sup> and the proceeds being used for school district purposes. With regard to these issues, my immediate predecessor has aptly observed:

[S]chool districts are authorized by statute to sell, rent or exchange their property if doing so is reasonably related to the goal of providing a “general, suitable and efficient system of free public schools.” Ark. Const. art 14, § 1; A.C.A § 6-13-620(3) (Supp. 2003). I will further note that the Arkansas Supreme Court has held that in certain circumstances “public advantage” can constitute adequate consideration for a sale. *See City of Blytheville v. Parks*, 221 Ark. 734, 255 S.W.2d 962 (1953). Given the fact that a school district’s sole priority under the constitutional mandates discussed above is the advancement of its student’s educational interests, I believe the “public advantage” that might constitute an element of consideration supporting a sale of district property must be directly related to advancing free, fair and efficient public education.<sup>11</sup>

At issue in my predecessor’s opinion was the question, *inter alia*, of what might constitute adequate consideration for the sale of unused school district property to a city. In addressing this question, my predecessor offered the following:

I am neither authorized nor equipped to make the factual determination whether a sale below fair market value would be

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<sup>9</sup> A.C.A. § 6-13-620(a)(12).

<sup>10</sup> Although it does not bear directly on your question as posed, you have attached to your request a copy of House Bill 1892, which was introduced in the 2011 Regular Session of the Arkansas General Assembly and withdrawn on March 29, 2011. This bill proposed, *inter alia*, to amend A.C.A. § 6-13-111 to permit the sale of unused school district buildings only at “near fair market value” – i.e., at 90% or more of recently appraised value – subject to the district’s conditional right of first refusal to repurchase the building or real property should the purchaser elect to sell it. This condition on the sale of such properties is not expressly stated in the current statute. You have not asked, and I will not address, whether selling school district property at below fair market value pursuant to this withdrawn amendment would withstand constitutional scrutiny.

<sup>11</sup> Op. Att’y Gen. No. 2004-056. *See also* Op. Att’y Gen. No. 2005-300 (generally discussing the question of what consideration might be deemed adequate in connection with such a sale).

supported by consideration in the form of educational public advantage in this instance. However, should the Bearden School District, in the exercise of its broad discretion, elect to sell the unused property to the City of Thornton, any finder of fact weighing the adequacy of the consideration might well be influenced in its determination by evidence that maintaining the unused property would have acted as a drain on the school district's resources. Beyond this speculation, I can only opine that the school district is barred from simply donating the property to the city.<sup>12</sup>

In another opinion addressing this issue, my predecessor concluded that the Code “leav[es] it to the discretion of the school district board whom the purchaser will be and what consideration the school district will receive,” with that discretion bounded only by the above recited principles set forth in *Safferstone, supra*.<sup>13</sup> In yet another opinion, he opined that “a court reviewing the adequacy of consideration would likely take into account both that retaining the property would in itself constitute a financial drain to the district and, possibly, that the buyer of the property would commit to using it for educational purposes.”<sup>14</sup> I have further opined, however, that “freeing up educational money” that might otherwise have been spent to maintain and insure a condemned school district building would probably not in itself “qualify as nonmonetary consideration” sufficient to support a contractual conveyance of the property.<sup>15</sup>

With respect to the lease of school district properties, I fully concur with the following analysis offered by one of my predecessors:

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<sup>12</sup> Op. Att’y Gen. No. 2004-056. *Accord* Op. Att’y Gen. No. 2003-349 (opining that a school district board, in the reasonable exercise of its discretion in pursuing authorized educational goals, may, in exchange for adequate consideration, sell an abandoned building that it would otherwise have to demolish or to restore at significant cost); *compare* Op. Att’y Gen. No. 2001-102 (opining that a reviewing court might well question a conveyance of school district property below fair market value to a city when the city intended to lease or sell the property to establish a private school).

The question of when a donation of school district property might be warranted is discussed below in my text.

<sup>13</sup> Op. Att’y Gen. No. 2005-300.

<sup>14</sup> Op. Att’y Gen. No. 2003-349.

<sup>15</sup> Op. Att’y Gen. No. 2008-128.

Although a school district is statutorily authorized to lease its properties, A.C.A. § 6-13-620(3), it is constrained in this authority by the overarching constitutional mandate to undertake only activities “necessary and lawful for the conduct of efficient free public schools in the district.” A.C.A. § 6-13-620(13); see Ark. Const. art. XIV, § 1 (directing that “the State shall ever maintain a general, suitable and efficient system of free public schools”). As I noted in the attached Ark. Op. Att’y Gen. No. 2001-102, which generally addresses the standard of discretion of school districts to lease property, a school district “is empowered by statute to sell, rent or exchange . . . property, presumably for whatever use the recipient intends, if doing so is reasonably related to the goal of providing efficient free public schools.”<sup>16</sup>

With respect to the donation of school district property, which you also mention specifically in your question, the Code provides in pertinent part:

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(b)(1) If the board of directors for a school district determines that any real estate owned or controlled by the school district is not required for the present or anticipated future needs of the school district and that the donation thereof would serve *a beneficial educational service for the pupils of the school district*, then the school district is also empowered and authorized to donate property or any part thereof to a publicly supported institution of higher education, a technical institute, a community college, a not-for-profit organization, or any entity thereof for any of the following limited purposes:

(A) Having the real property improved, upgraded, rehabilitated, or enlarged by the donee;

(B) Providing a publicly supported institution of higher education or a technical institute or community college with the donated property

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<sup>16</sup> Op. Att’y Gen. No. 2001-174; accord Op. Att’y Gen. No. 2000-270.

in which to hold classes for students who are from the school district or to educate pupils from within the donating school district even if students from outside the school district might also benefit; or

(C) Providing community programs, social enrichment programs, or after-school programs for students who are from the school district or educating pupils from within the donating school district even if other persons in the community or students from outside the school district might also benefit.

(2) Furthermore, school districts may donate the fee simple title and absolute interest, without any reservations or restrictions, in and to all real property or any part of the property to the publicly supported institution of higher learning or community college if this property was previously conveyed or otherwise transferred by the institution or college to the school district without cost.

\* \* \*

(d)(1) If the school district donates real property to an entity under this section, then the school district shall have the right of first refusal to reacquire the real property if the entity decides to sell or otherwise dispose of the real property.

(2) The school district shall not be required to compensate the entity for any improvements to real property reacquired under this subsection.<sup>17</sup>

This statute is noteworthy in various respects. First, it mandates in the highlighted phrase as a precondition of any donation of school district property that the donation in itself provide an educational benefit to the district's students.<sup>18</sup>

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<sup>17</sup> A.C.A. § 6-21-108 (Repl. 2007) (emphasis added).

<sup>18</sup> The withdrawn bill referenced in note 10, *supra*, proposed to amend A.C.A. § 6-21-108 to permit a district to donate its unused real property if doing so “would serve a beneficial educational service for the citizens of the school district.” An earlier version of this proposed amendment would have required that the educational benefit redound to the benefit of the school district’s “pupils,” as distinct from its “citizens.” Given that the upshot of the constitutional mandate is to assure each of the state’s *children* an

Second, it restricts the donation to one of the recited recipients. Third, with one possible exception that I will discuss immediately below, it requires that the donation to the recited recipients directly benefit district students in one or more of the recited manners. And finally, it affords a donating school district a right of first refusal to reacquire the property under the recited conditions should the donee decide to dispose of it by sale or otherwise.

As noted in my previous paragraph, subsection (b)(1)(A) of the statute appears to authorize donating district property to one of the recited donees for a purpose that might not necessarily benefit the donating district's students. Although the donated property itself would doubtless benefit from being "improved, upgraded, rehabilitated, or enlarged by the donee," there is no assurance that this benefit would extend to the district's pupils. Although this provision, if read in isolation, might invite constitutional attack in a particular instance as involving an impermissible diversion of school district assets,<sup>19</sup> I believe this provision must be read in conjunction with the highlighted passage in the introductory paragraph of subsection (b)(1). In accordance with constitutional mandates, subsection (b)(1) requires that *any* donation realize "a beneficial educational service for the pupils of the school district."<sup>20</sup>

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adequate and substantially equal education, *Fort Smith School District v. Beebe*, 2009 Ark. 333, 11-12, 322 S.W.3d 1, \*7-8, *Lake View Sch. Dist. No. 25 v. Huckabee*, 362 Ark. 520, 210 S.W.3d 28 (2005), I question whether the diversion of school district assets to benefit the district's "citizens," as distinct from its "pupils," would withstand constitutional challenge.

<sup>19</sup> See Op. Att'y Gen. No. 2004-213 (opining that a donation of school district real property to a city or municipality would run afoul of Ark. Const. arts. 14, § 3 and 16, § 11, the latter of which provides that "no moneys arising from a tax levied for one purpose shall be used for any other purpose"). *Accord* Ops. Att'y Gen. Nos. 2004-056 and 2001-102.

<sup>20</sup> This reading accords with the maxim of statutory interpretation providing that legislative enactments alleged to be in conflict must be reconciled, read together in a harmonious manner, and each given effect, if possible. *Gritts v. State*, 315 Ark. 1, 864 S.W.2d 859 (1993); *City of Fort Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (1993). I am guided by the principle that statutes are presumed constitutional, with the burden of proving otherwise placed on the challenger. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999); *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997). If it is possible to construe a statute as constitutional, a court must do so. *Jones v. State*, 333 Ark. 208, 969 S.W.2d 618 (1998). Moreover, in construing a statute, a court will presume that the General Assembly, in enacting it, possessed the full knowledge of the constitutional scope of its powers. *McLeod v. Santa Fe Trail Transp. Co.*, 205 Ark. 225, 168 S.W.2d 413 (1943).

Determining how a school district's students would benefit from a donation of school district properties to realize one of the ends recited in subsection (b)(1)(A) will in each instance involve undertaking a factual inquiry of a sort that this office is not authorized to conduct.<sup>21</sup> In my opinion, to the extent that the maintenance of unused property might constitute a drain on a school district's resources, a reviewing court might view any disposition of property by donation under this subsection as in itself affording the district a benefit that would pass constitutional muster.<sup>22</sup> However, extrapolating from my previous opinion that "freeing up educational money" would not in itself constitute consideration sufficient to support a contractual conveyance of condemned school district property,<sup>23</sup> I question whether an outright gift for noneducational uses of property that is draining a district's resources would be deemed to accord the district's students a "beneficial educational service" of the sort required under the statute. Nevertheless, I consider this a close call. I have found no binding authority directly on point.

Finally, I must note the possible relevance of A.C.A. § 14-169-803 (Repl. 1998), which provides:

Any school district owning lands and buildings within the boundaries of any existing urban renewal project or neighborhood development program, or within the boundaries of any such project or program that may be constituted in the future, is authorized to donate and dedicate to the governing board of any such urban renewal program or neighborhood development project as may be created any surplus lands or buildings owned by it if the lands or buildings are found by the board of the school district to be surplus to its present needs or the lands and buildings are unsuitable for further use by the school.

On its face, this statute authorizes a school district to donate property to an urban renewal project or a neighborhood development program, so long as the donated property lies within the project or program boundaries and the district deems the

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<sup>21</sup> See Op. Att'y Gen. No. 2008-128 (discussing the factual nature of such an inquiry).

<sup>22</sup> This consideration strongly resembles the non-monetary consideration in a sales context discussed in Opinion No. 2004-056 and note 10, *supra*.

<sup>23</sup> Op. Att'y Gen. No. 2008-128.

property surplus or unsuitable for school use.<sup>24</sup> As this office has previously noted,<sup>25</sup> in accordance with the above discussed principles, this statute might be subject to constitutional challenge if applied to support a conveyance of school district property that fails to realize an educational benefit for the school district's students.

***Question 2: If a school district has a building or property, on which it has an indebtedness, but which is no longer being utilized by the school, may the school sell, donate or lease that property or building?***

I have set forth in my response to your previous question the circumstances under which a school district may dispose of or lease its unused real property. In my opinion, the conditions discussed in my response will apply irrespective of whether that property is subject to an indebtedness.<sup>26</sup> The effect of an indebtedness upon any particular real estate transaction permitted under the above discussed principles will be purely a matter of contract law, to be assessed by counsel in each instance based upon all of the attendant circumstances.

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

Sincerely,

DUSTIN McDANIEL  
Attorney General

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<sup>24</sup> See Op. Att'y Gen. No. 2001-102 (generally discussing this statute).

<sup>25</sup> See, e.g., Op. Att'y Gen. No. 2004-213.

<sup>26</sup> See Op. Att'y Gen. No. 2008-091 (opining that, "under either the constitution or statutes," the existence of a district's bonded indebtedness would not foreclose a sale of school property when the indebtedness would remain the district's obligation).