

Opinion No. 2012-140

March 11, 2013

The Honorable Bryan B. King
State Senator
871 County Road 814
Green Forest, Arkansas 72638-2657

Dear Senator King:

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

Assuming the governing board of the county public library satisfies the requirements under Arkansas Code Annotated § 13-2-405(b) and (c), does § 13-2-405 allow the governing board of a county public library to use surplus funds in the operating and maintenance account of the library to match funds to finance necessary expansions or improvements for the library if the surplus maintenance and operation funds were derived from a millage levied for maintenance and operation under Amendment 38?

RESPONSE

The statute authorizes the diversion of surplus funds “available” in a library’s maintenance and operation (“M&O”) account to a capital improvement and construction account. Under the statute, this diversion of surplus “matching” M&O funds may be in any amount up to the amount of “federal or other funds available for financing necessary expansions or improvements of the public library.” Notwithstanding these provisions, however, I do not believe that surplus funds realized from an M&O millage levied pursuant to Ark. Const. amend. 38 can constitutionally be deemed “available” for any such diversion from M&O to capital construction or improvement. Amendment 38 is unambiguous in restricting to maintenance and operation the proceeds of a voter-approved M&O millage. Article 16, § 11 of the Arkansas Constitution more generally mandates that tax

revenues be used for their designated purposes. Accordingly, in my opinion, the constitution forecloses interpreting this statute as authorizing any diversion to a capital-expenditure account of surplus M&O revenues realized from an Amendment 38 millage. You have not asked about, and I will not address, the diversion under this statute of surplus M&O revenues arising from sources other than an Amendment 38 millage.

Subsection (a) of the statute you recite in your request authorizes the following:

The governing board of any county public library is authorized to use any surplus funds available in the operating or maintenance account of the public library for matching federal or other funds available for financing necessary expansions or improvements of the public library.¹

Subsections (b) and (c) set forth various procedural requirements that you assume, for purposes of your question, have been met.

The upshot of your question is whether the following provisions of Amendment 38 might foreclose any transfer of revenues of the sort you have described:

*The proceeds of any tax voted for the maintenance of a county public library or county library service or system shall be segregated by the county officials and used only for that purpose. . . . No claim against said funds shall be approved by the County Court unless first approved by the County Library Board, if there is a county Library Board functioning under Act 244 of 1927 [§§ 17-1001—17-1011] or similar legislation.*²

Before directly addressing this question, I feel obliged to address what I consider a misconception in your request. You apparently view your underlying question as arising from what you term an “ambiguity in law.” Specifically, you point out in your discussion of background facts that the statute quoted above does not derive from Act 244 of 1927,³ which is expressly mentioned in Amendment 38. The

¹ A.C.A. § 13-2-405(a) (Repl. 2003).

² Ark. Const. amend. 38, 2 (emphasis added; brackets in original). Act 244, as subsequently amended, is currently codified in various sections of subchapter 4, chapter 2, title 13 of the Arkansas Code (Repl. 2003 & Supp. 2011).

ambiguity you perceive consists in what you consider a lack of clarity regarding whether the above quoted statute qualifies as “similar legislation” of the sort referenced in Amendment 38. You appear to assume that if the statute indeed qualifies as “similar legislation,” it might without offending Amendment 38 authorize the diversion of surplus Amendment 38 M&O tax proceeds to match “federal or other funds available for financing necessary expansions or improvements of the public library.”

In my opinion, this assumption is mistaken, and your focus on the scope of Amendment 38’s reference to “similar legislation” is misplaced. The constitutional phrase “*if there is a county Library Board functioning under Act 244 of 1927 . . . or similar legislation*”⁴ does no more than acknowledge the possibility that a county library may exist without being administered by a library board.⁵ In the present case, a library board clearly exists, and it just as clearly functions under the statute recited above, among others. Concluding as much, however, does not resolve the underlying constitutional question, which is whether a library board, pursuant to the statute at issue, may divert voter-approved M&O funds to the different end of financing capital construction. In my opinion, a reviewing court would almost certainly conclude that the answer to this question is “no.”

My immediate predecessor, in addressing generally whether a county library board could divert Amendment 38 M&O millage funds “to buy, build, add onto, or remodel” county libraries,⁶ offered the following conclusions:

Although Ark. Const. amend. 38, as amended by Ark. Const. amend. 72, does authorize using a library millage for capital improvements and construction of the sort referenced in your question, it requires that the millage be expressly identified on the ballot as dedicated to

³ Section 13-2-405(a) instead derives from Acts 1965, No. 402, § 1.

⁴ Emphasis added.

⁵ The fact that a county library may operate without a board is expressly acknowledged in A.C.A. § 13-2-404(b)(1) (Supp. 2011). *Accord* Op. Att’y Gen. No. 90-319 (“[R]ather than creating the Library Board, Amendment 38 contemplates the possibility that there is no such Board.”).

⁶ My predecessor was not asked specifically asked about using surplus M&O revenues as “matching” funds under the statute here at issue.

that purpose.^[7] Amendment 38 contains a separate section authorizing the voters to approve a millage expressly identified on the ballot as dedicated to library maintenance and operation.^[8] I believe that the proceeds of a millage approved for maintenance and operation of a county library may not be diverted to fund capital improvements or construction of the sort described in your question. *See* Ark. Const. art. 16, § 11 (prohibiting the use of tax proceeds for any purpose other than that approved by the voters). However, if the voters approve, a millage dedicated to maintenance and operation might be recharacterized as dedicated to capital improvements and construction.⁹

Without here repeating my predecessor's full analysis, which I have attached for your convenience, I will merely note that I concur fully both in his conclusions and in the reasoning offered in their support.

Your question differs from that addressed by my predecessor only in that you have specifically asked not about simply using M&O library-tax proceeds to finance capital construction, but rather about using such proceeds to match funds already available to finance such capital construction. In my opinion, in terms of constitutional propriety, this distinction is immaterial. The crucial factor here is the constitution's express proscription against diverting state funds from an authorized use approved by the voters to another use not so authorized. This diversion is in no way validated by the fact that funds from one or more other sources are available for capital construction or improvements, thereby arguably providing an occasion under the statute to use "available" surplus M&O funds to match such available capital funds. As my predecessor pointed out, as a matter of constitutional law, the proceeds of a tax levied by the voters pursuant to

⁷ The levy of such a millage for capital improvements and construction is authorized at Amendment 38, § 5.

⁸ Amendment 38, § 1.

⁹ Op. Att'y Gen. No. 2005-090. This opinion details the changes to Amendment 38 effected by Amendment 72, which I need not review here. The types of expenditures falling under the rubric of "support, operation, and maintenance of the public library" under Amendment 38 are detailed in A.C.A. § 13-2-404 (Supp. 2011); *see also* Op. Att'y Gen. No. 2009-019 (further discussing the permissible scope of such expenditures). Both the statute just referenced and my analysis in Opinion 2009-019 are fully consistent with the conclusion that the "expansions or improvements of the public library" contemplated in A.C.A. § 13-2-405(a) do not fall within the category of "operation and maintenance."

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Amendment 38, § 1 specifically to finance library M&O expenses *must* be used for that purpose unless the voters redesignate the permitted use.

The foregoing discussion should not be read to suggest that *any* diversion of surplus M&O funds to a capital construction or improvement account is constitutionally impermissible. The Code expressly acknowledges that library M&O revenues may arise from sources other than an Amendment 38 millage. You have not asked, and I will not here address, under what circumstances the diversion of surplus M&O from a source other than an Amendment 38 millage might be permissible.¹⁰ In my opinion, however, the statute could not constitutionally be read as applying to surplus M&O funds arising from an Amendment 38 millage.¹¹

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosure

¹⁰ I will simply note here that alternative sources of M&O financing are expressly addressed in A.C.A. § 13-2-404.

¹¹ I do not consider this conclusion as contradicting my predecessor's conclusion in Op. Att'y Gen. No. 90-319, which addressed whether, if a library board exists, a quorum court might control Amendment 38 M&O revenues beyond appropriating them. My predecessor answered this question in the negative, commenting in passing as follows: "The clearest area of infringement would involve a Quorum Court's attempt to prevent a Library Board's use of surplus funds for matching federal or other funds available for financing expansions or improvements of the library. See A.C.A. § 13-2-405." In offering this conclusion, however, my predecessor was not opining that the constitution would permit transferring surplus Amendment 38 M&O funds to a capital construction account. On the contrary, invoking Amendment 38, § 2, my predecessor quite appropriately observed: "[T]he proceeds of any tax levied for the maintenance of the county libraries can only be used for that purpose." My predecessor summarized as follows the only principle upon which his opinion turned: "While the tax proceeds must be appropriated, it does not follow that the Quorum Court retains the right to administer a previously approved appropriation."