

Opinion No. 2013-136

January 21, 2014

The Honorable Jimmy Hickey Jr.  
State Senator  
1600 Arkansas Blvd., Suite 106  
Texarkana, Arkansas 71854

The Honorable Carlton Jones  
Prosecuting Attorney  
Miller County Courthouse  
400 Laurel Street, Room 6  
Texarkana, Arkansas 71854

The Honorable Mary P. “Prissy” Hickerson  
State Representative  
2805 Forest Avenue  
Texarkana, Arkansas 71854

Dear Senator Hickey, Representative Hickerson, and Mr. Jones:

This is my opinion on your questions about uses of revenues from a tax levied under the Advertising and Promotion Commission Act (the “Act”).<sup>1</sup> The Act authorizes a municipal tax, sometimes referred to as the “hamburger tax,” on hotel and restaurant sales (the “A&P tax”).<sup>2</sup> Tax revenues are deposited in a municipal advertising and promotion fund (the “A&P fund”).<sup>3</sup> A city levying the A&P tax must create a municipal advertising and promotion commission (the “A&P commission”).<sup>4</sup>

You provided the following background:

In 2005, the Texarkana, Arkansas, Advertising and Promotion Commission (the “A&P Commission”) began what it refers to as the

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<sup>1</sup> A.C.A. §§ 26-75-601 to -619 (Repl. 2008, Supp. 2013).

<sup>2</sup> See A.C.A. § 26-75-602 (Supp. 2013).

<sup>3</sup> See A.C.A. § 26-75-604 (Repl. 2008).

<sup>4</sup> See A.C.A. § 26-75-605 (Repl. 2008).

"Franchise Fee Bond Swap" in 2005. Since 2005, the A&P Commission has approved an annual contribution to the General Fund called a Franchise Fee Swap. The stated purpose of this contribution is to reimburse the General Fund for payments on an economic development bond. The bond payments are made using franchise fees collected in the General Fund. The A&P contribution could not be directly used to retire the debt service since there was not a vote by the citizens to approve this use of A&P Funds. As a result, it has been used to replace franchise fees in the General Fund for expenditures associated with economic development. The Franchise Fee Swap payments are currently replacing the franchise fees collected in General Fund to make payments on the 2010 Franchise Fee Bond.

In addition, in 2010, and in connection with the development, construction and operation of a Hotel/Convention center in Texarkana, Arkansas, the A&P Commission began awarding the convention center certain annual contributions and other lump sum amounts of advertising and promotion funds. In 2010, \$100,000 was so contributed and, \$150,000.00 has been likewise contributed for the years 2011, 2012 and 2013; for a total of \$550,000.00 thus far. The contribution to the convention center has been pledged for total of 15 years. The convention center is privately owned and operated and the real property upon which the convention center building is constructed is privately owned. The City does own a parking lot that constitutes a portion of the convention center parking area.

In 2012, and in connection with the development, construction and operation of a water park that is adjacent to the convention center, the A&P Commission began awarding to the water park annual advertising and promotion contributions of \$250,000.00 for the maintenance and operations of the Holiday Springs Water Park. From that pledge, \$250,000 was paid in 2012 and \$100,000 has been paid so far in 2013. The A&P Commission has pledged the continuation of this contribution for 20 years in total. Furthermore, as part of an incentive package to the water park, the A&P Commission also awarded a lump sum amount of \$513,000 on December 20, 2012, to the water park making a total of \$863,000 which has been paid to date. The water park is privately owned and operated and

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the real property upon which the physical water park improvements (slides, concessions, etc.) are located is privately owned. However, the City does own a parking lot that constitutes a portion of the water parking lot (and which is separate from the convention center parking owned by the City and described above). In 2009 the City Manager entered into an agreement with the Hotel/Convention Center which pledged the A&P Commission to refund the A&P taxes generated by sales at the new Hotel/Convention Center for a period of 15 years. There have never been similar refund agreements of A&P taxes to other A&P taxpayers.

In 2012 the City Manager entered into an agreement with Holiday Springs Water Park which pledged the A&P Commission to refund the A&P taxes generated by sales at the Waterpark for a period of 20 Years. There have never been similar refund agreements of A&P taxes to other A&P taxpayers. Attached are the incentive agreement(s) and approvals of the same reflected in the minutes of the A&P Commission or the Board of Directors for the City of Texarkana, Arkansas.

Your questions are:

1. Is the Franchise Fee Bond Swap as described above a permissible use of advertising and promotion funds?
2. Is the annual award or the lump sum award to the convention center as described above a permissible use of advertising and promotion funds?
3. Is the annual award or the initial lump sum award to the water park as described above a permissible uses of advertising and promotion funds?
4. Is the pledge to return A&P taxes generated by the Hotel/Convention Center and Holiday Springs Water Park to the entities permissible?

## **RESPONSE**

I am unable to opine with confidence on any of your questions because the answers are heavily dependent on the totality of the attendant facts and circumstances. Although you have provided considerable factual background, it is clear to me that I do not possess all facts relevant to the transactions. I have neither the resources nor the statutory charge to act as a finder of fact in connection with

rendering written opinions, and the opinions process is not the sort of adversarial proceeding that tends, due to the parties’ opposing interests, to elicit all material facts. While I accordingly cannot provide definitive answers to your questions, I will discuss how applicable law might apply.

In general with respect to all your questions, A&P tax revenues may be used for the purposes set forth in a section of the Act entitled “Use of funds collected,”<sup>5</sup> provided a proposed use is not prohibited by another subsection thereof.<sup>6</sup> Another provision of the Act appears to authorize certain other bond-payment-related uses of A&P tax revenues.<sup>7</sup>

Whether A&P tax revenues can be used for a particular purpose is a question that turns on the facts and circumstances of the case.<sup>8</sup> The A&P commission is the body that determines how A&P tax revenues will be used.<sup>9</sup> The A&P commission has broad discretion to determine whether a proposed use is appropriate under the Act.<sup>10</sup> An administrative body’s interpretation of a statute it is charged with administering is given considerable deference and will not be overturned unless clearly wrong.<sup>11</sup>

***Question 1 – Is the Franchise Fee Bond Swap as described above a permissible use of advertising and promotion funds?***

This question is complicated by the fact that it is not entirely clear what a court would characterize the use to be. Depending on the characterization, the use might or might not be permitted under the Act.

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<sup>5</sup> A.C.A. § 26-75-606(a), (b) (Repl. 2008).

<sup>6</sup> A.C.A. § 26-75-606(c).

<sup>7</sup> A.C.A. § 26-75-613 (Repl. 2008).

<sup>8</sup> See, e.g., Op. Att’y Gen. 2013-103, 2008-121.

<sup>9</sup> See A.C.A. § 26-75-606(a)(2)(A).

<sup>10</sup> See, e.g., Op. Att’y Gen. 2002-101, 2008-121, and opinions cited in latter.

<sup>11</sup> See, e.g., *Brookshire v. Adcock*, 2009 Ark. 207, 307 S.W.3d 22.

One might maintain that A&P tax revenues are being used to indirectly pay the franchise fee bonds. Does the Act permit such a use? The franchise fee bonds clearly were not issued under the Act, which appears to contemplate that A&P tax revenues normally will be pledged to the repayment of bonds issued under the Act.<sup>12</sup> The Act does permit the pledge of A&P tax revenues to the repayment of convention center bonds issued under any law, “tourism revenue bonds,” and certain other bonds issued other than under the Act.<sup>13</sup> But the pledge of A&P tax revenues to the repayment of bonds not issued under the Act contemplates that the pledge will be made at the time the bonds are issued: the Act requires an authorizing ordinance of the municipality.<sup>14</sup> I do not know whether the Franchise Fee Bond Swap is performed pursuant to an express pledge of A&P tax revenues to the repayment of the franchise fee bonds. Nor do I know whether one or more authorizing ordinances were enacted. I accordingly cannot determine how plausible would be an argument that the Franchise Fee Bond Swap amounts to an use of A&P tax revenues authorized by the Act to repay bonds issued other than under the Act.<sup>15</sup>

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<sup>12</sup> See, e.g., A.C.A. § 26-75-606(a)(1)(A)(iv), (b)(2)

<sup>13</sup> See A.C.A. § 26-75-613(a).

<sup>14</sup> See A.C.A. § 26-75-613(b).

<sup>15</sup> While I do not know, I doubt that A&P tax revenues are expressly pledged to the trustee and holders of the franchise fee bonds. I assume that the franchise fee bonds were issued as revenue bonds under Amendment 65 without a vote of the electors. See Op. Att’y Gen. 2011-014 (concluding that “utility franchise fee receipts are almost certainly fees, not taxes, for Amendment 65 purposes,” which means that bonds backed by franchise fee receipts may be issued under Amendment 65 without an election). In that opinion, I quoted the Arkansas Supreme Court:

Amendment 65 prohibits a city from doing indirectly that which it cannot do directly. Because Amendment 65 forbids repaying revenue bonds with assessments from [sic] local improvements or taxes, it correspondingly forbids pledging tax revenues to fill the gaps left by using other sources of monies to repay the bonds. In short, using tax revenues to offset losses caused by pledging revenues from . . . fees to cover bond indebtedness is indirectly using tax revenues to secure repayment of the bonds, which is prohibited conduct.

*Harris v. City of Little Rock*, 344 Ark. 95, 102, 40 S.W.3d 214 (2001). As was the case in the 2011 opinion, it is not clear how the rules stated in *Harris* would be applied to these transactions. Perhaps it is sufficient to note that arguing that the Franchise Fee Bond Swap amounts to using A&P tax revenues for the payment

Alternatively, one might maintain that the use of the A&P tax revenues is whatever use is made of those dollars after they are deposited in the city’s general fund. Your request for my opinion can be read to imply that the funds are used by the city for purposes that would be permissible were they used directly by the A&P Commission for the same purposes. If that is the case, the Act may permit the use but I deem it more likely that it does not. The Act provides that the A&P Commission “is the body that determines the use” of A&P tax revenues.”<sup>16</sup> It is not clear how the A&P Commission could maintain control of the funds, so as to direct their ultimate use in a manner permitted by the Act, after they are placed in the city’s general fund.

As yet another alternative, one might maintain that the A&P Commission “uses” the A&P tax revenues simply by depositing them into the city’s general fund, without looking to what the city ultimately uses the money for. If one accepts that characterization, the use is clearly impermissible. The Act expressly prohibits using A&P tax revenues for “general capital improvements within the city” or “costs associated with the general operation of the city . . . .”<sup>17</sup> It is my understanding that these two items, the latter in particular, substantially describe what a city’s general fund is normally used for.

***Question 2 – Is the annual award or the lump sum award<sup>[18]</sup> to the convention center as described above a permissible use of advertising and promotion funds?***

The Act provides that A&P tax revenues may be used for “[c]onstruction, reconstruction, extension, equipment, improvement, maintenance, repair, and operation of a convention center . . . .”<sup>19</sup> The payments apparently are made at

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of bonds issued other than under the Act is an argument whose success may call into question the franchise fee bonds’ validity.

<sup>16</sup> A.C.A. § 26-75-606(a)(2)(A).

<sup>17</sup> A.C.A. § 26-75-606(c)(2)(A), (B).

<sup>18</sup> I cannot determine from the facts provided to what “lump sum” you refer.

<sup>19</sup> A.C.A. § 26-75-606(a)(1)(A)(ii).

least in part under a contract that calls for the payments to be “used exclusively for the convention center portion of the project.” It thus appears likely from the facts of which I am aware that the payments at issue fall within this statutory description. In that sense, then, the use is probably a permissible one under the terms of the Act.

But because the convention center is privately owned, a constitutional prohibition on donating public money to private parties must be considered.<sup>20</sup> As noted, there is a contract between the city and the convention center’s owner pursuant to which the city agreed that the A&P Commission would pay \$100,000 per year for 15 years.<sup>21</sup> One could certainly argue, therefore, that there is no donation but rather payments under a contract supported by adequate consideration, and thus that the constitutional provision is not implicated. The constitutional provision’s applicability will depend on the adequacy of the consideration flowing to the city under the contract, in exchange for the city’s payments and other promises. The consideration’s adequacy is a question of fact I cannot address.<sup>22</sup>

***Question 3 – Is the annual award or the initial lump sum award to the water park as described above a permissible uses of advertising and promotion funds?***

The Act provides that A&P tax revenues may be used for “operation of tourist-oriented facilities, including, but not limited to, theme parks and other family entertainment facilities.”<sup>23</sup> A contract between the city and the water park’s owner

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<sup>20</sup> Ark. Const. art. 12, § 5 (prohibiting cities from “obtain[ing] or appropriate[ing] money for . . . any corporation, association, institution or individual”); *compare, e.g.*, Op. Att’y Gen. 2007-276 (A&P commission probably may not donate to private entity operating city history museum), *with, e.g.*, Op. Att’y Gen. 2012-066 (county probably may donate to city). The constitutional prohibition also does not apply to payments that are consideration under a valid contract. *See, e.g., City of Ft. Smith v. Bates*, 260 Ark. 777, 544 S.W.2d 525 (1976) (Ark. Const. art. 12, § 5, does not limit city’s power to give consideration under contract).

<sup>21</sup> You state that the payment has been \$150,000 in recent years, not \$100,000. Perhaps the contract has been amended to require the higher amount. If not, payment of more than required under the contract may complicate an argument that the payments are supported by adequate consideration.

<sup>22</sup> *See, e.g.*, Op. Att’y Gen. 2009-113.

<sup>23</sup> A.C.A. § 26-75-606(b)(1)(A).

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provides that the “A&P Commission has already committed \$250,000 per year for 20 years from 2012 for maintenance and operation” of the water park. I cannot determine the relevance a court might attach to the fact that the Act permits expenditures of A&P tax revenues for “operation” while the contract describes the payments as being for “maintenance and operation.”

Separately, the Act provides that A&P tax revenues may be used for “maintenance . . . and operation of public recreation facilities . . . .”<sup>24</sup> I have little doubt that the water park would be deemed by a court to be a recreational facility but it is not as clear that a court would deem the water park to be “public.” It is public in the sense that it is presumably open to the public, but I know of no authority on the question of whether a privately owned recreational facility can be a “public recreation facility” within the meaning of the Act.

It appears to me more likely than not that a court would hold that, insofar as the Act is concerned, the water park payments are permissible under one or both of the Act’s provisions discussed above. As in the case of the convention center payments, however, a court would consider whether for constitutional purposes the payments are donations or consideration under a contract. The facts of which I am aware here are slightly less favorable to the city than are the facts of which I am aware concerning the convention center payments. The convention center contract itself requires the convention center payments. The water park contract of which I am aware, by contrast, states that the A&P Commission has “already committed” to make the water park payments. This usage suggests that there is another contract under which the water park payments are being made, or that they are being made outside any contract, and thus arguably are donations. In addition, the lump sum payment is not addressed at all in the water park contract of which I am aware, suggesting that it was made under another contract or that it was made outside any contract, and thus arguably was a donation.

***Question 4 – Is the pledge to return A&P taxes generated by the Hotel/Convention Center and Holiday Springs Water Park to the entities permissible?***

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<sup>24</sup> A.C.A. § 26-75-606(b)(2).

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As far as the Act is concerned, the analysis here is much like that described in my answers to your second and third questions. The expenditures can be argued to be for construction, etc., of a convention center, and for operation of tourist-oriented facilities and/or public recreation facilities. The Act makes no distinction between uses in amounts that relate in a certain way to A&P tax collection amounts, and uses that do not so relate.

The more difficult question is, once again, the applicability of the constitutional provision that prohibits donation of public money to private entities. Arguing that A&P tax revenue rebates are not donations but rather consideration under contracts may be somewhat more problematic here because the amounts paid over by the A&P Commission depend solely on the sales made at the convention center and water park that are subject to the tax. Acknowledging that fact may compel a defender of the payments to argue that the consideration provided by the owner of the convention center and water park varies with sales.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM:JMB/cyh