STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2011-126

February 3, 2011

The Honorable Uvalde Lindsey
State Representative
2257 East Gentle Oaks Lane
Fayetteville, Arkansas 72703-6142

Dear Representative Lindsey:

This is my opinion on your questions about regional mobility authorities ("RMA's"), created under and governed by the Regional Mobility Authority Act, A.C.A. §§ 27-76-101 to -713 (Repl. 2010, Supp. 2011) (the "RMA Act").

RESPONSE

Question 1 – Assuming two or more counties have properly formed a regional mobility authority, does § 27-76-203(b) sufficiently authorize the member counties to make the approval of a county sales tax in their county subject to the approval of an identical tax in each of the other member counties?

The RMA Act requires RMA members to enter into an agreement with one another. A.C.A. § 27-76-203(a)(2) (Repl. 2010). The subsection you cite provides that the agreement "shall establish the terms and conditions of the operation of the [RMA] with the limitations provided in [the RMA Act] and other applicable laws." A.C.A. § 27-76-203(b). In my opinion, an agreement among RMA member counties to make each county's approval of a sales tax to support the RMA contingent on every other county's approval of an identical tax may fairly be characterized as a term or condition of the RMA's operation and thus within the statutory authorization and direction.[1]

[1] You have not asked, and I accordingly do not consider at length, whether the contemplated agreement's performance would be lawful. I see no serious impediment, though one might argue that such a contingent approval procedure involves an impermissible delegation of legislative authority inasmuch as it gives other counties some voice in whether a tax is imposed in a given county. Such an argument probably would not

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Question 2 – Assuming one or more member counties properly pass a sales tax to finance the regional mobility authority, does state law require the separation of sales tax revenues by county for use only in the county in which the revenues were raised, or prohibit combining those funds for general use by the regional mobility authority?

In my opinion, state law does not require such separation or prohibit such combination. The RMA Act provides that an RMA "may be financed or supported by receiving . . . revenue from the levy by *a member county* of a sales tax . . . for the *benefit of the [RMA]* . . . ." A.C.A. § 27-76-601(a)(1) (Repl. 2010) (emphases added). In my view, this language clearly indicates that sales tax revenue from one or more member counties may be applied to the support of an RMA as a whole.

A public purpose must underlie the exercise of any legislative power. *See, e.g., Chandler v. Bd. of Tr. of the Teacher Retirement Sys.*, 236 Ark. 256, 365 S.W.2d 447 (1963); *Stuttgart Rice Mill Co. v. Crandall,* 203 Ark. 218, 157 S.W.2d 205 (1941); *Cobb v. Parnell,* 183 Ark. 429, 36 S.W.2d 388 (1931). "The objects for which money is raised by taxation must be public, and such as subserve the common interest and well being of the community required to contribute." *Gray v. Mitchell,* 373 Ark. 560, 571, 285 S.W.3d 222 (2008) (quoting *Chandler,* 236 Ark. at 258).

One could question the public purpose served in applying county tax proceeds regionally, comingled with funds collected in other counties. But the General Assembly, in passing the RMA Act, obviously perceived a public purpose and local benefit arising from regional transportation projects and cooperation. "What constitutes a public purpose is for the General Assembly to determine." *Turner v. Woodruff,* 286 Ark. 66, 72, 689 S.W.2d 527 (1985). That determination is afforded "great weight." *Id.* In my opinion, the public purpose requirement would not

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prevail, in my view. *See generally Gallas v. Alexander,* 371 Ark. 106, 263 S.W.3d 494 (2007) (discussing difference between delegating power to make law, and conferring authority as to law's execution), and authorities cited therein; *see also, e.g., Hasha v. City of Fayetteville,* 311 Ark. 460, 845 S.W.2d 500 (1993) (sales tax levy conditioned on bond election result), Op. Att'y Gen. 2004-276 (legislature could make tax collection contingent on amount of other governmental revenues), Op. Att'y Gen. 95-409 (legislature made tax levy contingent on bond issuance).

generally require the separation or prohibit the combination of funds contemplated by your question. *Cf. Hackler v. Baker, County Judge,* 233 Ark. 690, 346 S.W.2d 677 (1961) (county bond proceeds could be spent to construct facility in adjacent, cooperating county).

Question 3 – May a county, under Arkansas Code § 26-74-201 et seq., or a city, under Arkansas Code § 26-75-301 et seq., enter into an agreement with a regional mobility authority to construct a regional transportation project, located in the member counties, using the financing powers of counties and cities as stated in the referenced chapters? Does it make a difference if the regional transportation project is located in some but not all of the member counties, assuming the project is either in or near each member county?

The county sales tax statute you cite authorizes counties to construct capital improvements of a public nature "within *or near* such counties . . . ." A.C.A. § 26-74-204(a) (Repl. 2008) (emphasis added). "Construct," for purposes of the statute, includes contracting for construction. A.C.A. § 26-74-203(4) (Repl. 2008). "Capital improvements of a public nature" includes among other things streets, roads, port facilities, airport facilities, public transit facilities, bridges, parking facilities, pedestrian facilities, waterways, and RMA surface transportation systems. A.C.A. § 26-74-203(3). Counties may issue bonds, use the proceeds of the sale thereof to pay for the construction of a permitted project, and apply sales tax collections to pay debt service on the bonds. A.C.A. § 26-74-204(a).

The city sales tax statute you cite contains provisions substantially identical to those described above. *See* A.C.A. §§ 26-75-304(a), -303(5), -303(3) (Repl. 2008).

Counties are constitutionally empowered to contract "for any public purpose . . . with any political subdivisions of the State . . . ." Ark. Const. amend. 55, § 1(c). That power is reiterated in the County Government Code. *See* A.C.A. 14-14-801(b)(4) (Repl. 1998).

Cities are authorized by statute to enter into contracts. A.C.A. § 14-54-101(2) (Repl. 1998). A municipal contract must serve a public purpose. *See* A.C.A. § 14-42-307(a)(1) (Repl. 1998); Op. Att'y Gen. 2008-179.

In my opinion, under the authorities cited above, a county or city may enter into an agreement with an RMA[2] to construct a regional transportation project that constitutes a capital improvement of a public nature, and may finance project costs pursuant to the applicable sales tax statute, provided that the project is located within the boundaries of, or near, the county or city.

Question 4 – Are there any constitutional or statutory provisions (other than that contained in the enabling statute) that would impede a regional mobility authority from referring a sales tax, or other tax authorized under Arkansas Code § 27-76-601, directly to the voters in each county within the boundaries of the regional mobility authority?

In my opinion, an RMA has no authority under the RMA Act or otherwise to refer any tax listed in A.C.A. § 27-76-601 directly to the voters of a taxing jurisdiction.

The RMA Act lists sources of funds from which an RMA may be "financed or supported." A.C.A. § 27-76-601(a). The taxes listed as sources are county or city sales taxes levied for the benefit of the RMA under specified statutes or as additionally authorized, and the county motor vehicle tax. A.C.A. § 27-76-601(a)(1)-(4). Except to the extent it may be referred to voters by petition of the voters themselves, each specified sales tax is referred to voters by the taxing entity's governing legislative body. *See* A.C.A. §§ 26-74-207(a)(1), (3) (Repl. 2008), 26-74-307(a)(1), (3) (Repl. 2008), 26-74-402(a) (Repl. 2008) (county sales taxes); A.C.A. §§ 26-75-207(a) (Supp. 2011), 26-75-307(a) (Repl. 2008) (municipal sales taxes). The county motor vehicle tax is levied by the quorum court and referred to voters by the county court. *See* A.C.A. § 26-78-103(b)(1) (Supp. 2011); *see also* A.C.A. § 26-78-120(d) (Repl. 2008) (procedure provided under A.C.A. § 26-78-103 to be used to levy county motor vehicle tax to support RMA). The General Assembly has not authorized any additional RMA-supporting county or municipal sales tax contemplated by A.C.A. § 27-76-601(a)(4).

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[2] For its part, an RMA is empowered to contract with a governmental entity to, among other things, "construct . . . a transportation project on behalf of a governmental entity within the boundaries of the [RMA] . . . ." A.C.A. § 27-76-403(a), (c)(2) (Supp. 2011). Note the absence of a requirement that the project lie wholly or partly within the boundaries of the contracting governmental entity.

The RMA Act itself gives an RMA no authority to refer any county or municipal tax to the jurisdiction's voters.

Clearly, then, there is no statutory authority for an RMA to refer any tax listed in A.C.A. § 27-76-601 directly to the voters of a taxing jurisdiction, and it is my opinion that an RMA has no such authority otherwise.[3]

Question 5 – Assuming that in the ballot measure or ordinance that was passed establishing a county sales tax there was no restriction limiting the use of the revenues to a specific purpose, may transportation projects of a regional mobility authority be funded by sales tax revenue from some but not all of the member counties?

The RMA Act provides that an RMA may receive funds from a county sales tax "requested and adopted . . . for the benefit of the [RMA]." A.C.A. § 27-76-601(a)(1). County sales tax statutes permit a county to designate sales tax revenue uses on the ballot. *See, e.g.,* A.C.A. § 26-74-208(c)(1)(A) (Supp. 2011). A county sales tax enacted without restriction as to use – *i.e.,* without designating an RMA as a beneficiary – will not, in my view, have been "adopted . . . for the benefit of the [RMA]." In my opinion, then, under the plain language of the RMA Act, revenues from such a tax levied without designation may not be used pursuant to A.C.A. § 27-76-601(a)(1) to fund RMA projects.

As discussed in my answer to your question 4, the RMA Act lists sources of funds from which an RMA may be "financed or supported." A.C.A. § 27-76-601(a). The list includes revenues from county sales taxes levied for the benefit of the RMA, as described in the foregoing paragraph, and revenues from any additional county sales tax authorized by law and levied for the benefit of the RMA. A.C.A. § 27-76-601(a)(1), (4). The list does not include county general funds or revenues from

[3] Any statute that purported to permit an RMA to directly refer a county or municipal tax to voters might involve an impermissible delegation of local legislative power to the RMA. An RMA's direct referral of a county or municipal tax to voters logically would follow formal RMA action functionally equivalent to enacting an ordinance levying the tax, subject to the voters' approval, and specifying the tax rate. Levying a tax and specifying its rate are acts unquestionably legislative in nature. The power to enact county ordinances – to make the law – is constitutionally vested in the quorum court and cannot be delegated. *See* Ark. Const. amend. 55, § 1; *cf. Adams v. Bryant,* 236 Ark. 859, 863, 370 S.W.2d 432 (1963) (delegation of legislative power to city commission "would have been unlawful").

county sales taxes levied without use designation. Nor does the list contain a catch-all item that might be deemed to include such funds or revenues. It is my view, then, that the list is exclusive and that an RMA is therefore without authority to receive county general funds or revenues from county sales taxes levied without use designation. A fundamental rule of statutory interpretation is *expressio unius est exclusio alterius,* which means that the expression of one thing may be interpreted as the exclusion of another. *See, e.g., State v. Oldner,* 361 Ark. 316, 206 S.W.3d 818 (2005). The legislature's descriptions, in subsections (a)(1) and (a)(4), of the county sales tax revenues that may be used to support an RMA – *i.e.,* revenues from taxes levied "for the benefit of" an RMA – would be rendered superfluous if the RMA Act were interpreted to permit an RMA to receive revenues from county sales taxes levied without use designation. It is accordingly my opinion that revenues from a county sales tax levied without designating an RMA as a beneficiary may not be used to fund RMA projects.

Question 6 – For the purposes of the following questions, please assume that the regional mobility statutes permit a regional mobility authority to issue bonds to fund transportation projects and repay the bonds using revenue generated by a sales tax approved in one or more member counties. What law, if any, might prohibit or limit such a financing and funding arrangement? Specifically, is Article 16, Section 1 of the Arkansas Constitution prohibiting the lending of credit limiting to financing and funding arrangements on transportation projects that concern regional counties when they are approved by the voters of the respective counties involved.

Question 6b – May a regional mobility authority repay the bonds with sales tax revenue generated under Arkansas Code § 27-76-601, assuming voters properly approve the sales tax and the bond issue?

I do not perceive any significant substantive difference between your questions 6 and 6b. Both appear to be broad, general inquiries about the legality of a hypothetical bond financing scheme undertaken in reliance on hypothetical authorizing legislation that does not currently exist and that is not described in any detail in your questions.

The assumption you request I make does not reflect the current state of the law. To the contrary, the RMA Act is clearly to the effect that an RMA may issue only

revenue bonds "payable from revenues derived from the [RMA's] transportation system." A.C.A. § 27-76-607(a) (Repl. 2010); *see also* A.C.A. § 27-76-604(i) (Repl. 2010). Accordingly, an RMA has no authority under the RMA Act to issue bonds payable from county sales tax revenues.[4]

You request that I assume, in effect, that the RMA Act has been amended in a manner stated in general but not specified in any number of particulars that might be relevant to answering your question. Any actual transaction authorized by the RMA Act as so amended would involve facts and circumstances that might be relevant to answering your question but are not stated in your question. And you refer to a constitutional provision[5] that has been interpreted in few Arkansas cases. As a result of all of the foregoing, particularly that the details of law that would apply to the transaction are simply unknown, it is impossible to say with certainty how a court would apply the constitutional prohibition at issue,[6] and any other law

[4] A bill introduced during the same legislative session at which the original RMA Act was enacted would have empowered RMA's to levy sales taxes and, arguably at least, to issue bonds payable from tax revenues. *See* SB438, 2005. The bill's author withdrew it from consideration.

[5] The provision states that a county, among others, may not "ever lend its credit for any purpose whatever . . . ." Ark. Const. art. 16, § 1.

[6] The constitutional prohibition on the lending of credit might be implicated in a transaction like that you contemplate. In *Barnhart v. City of Fayetteville,* 321 Ark. 197, 900 S.W.2d 539 (1995), the court found a city to have loaned its credit when it unconditionally obligated itself to pay waste disposal fees to a regional authority sufficient to make all debt service payments due on the regional authority's revenue bonds issued to finance the construction of a waste incinerator, regardless of whether the incinerator was built or the services were provided otherwise. The agreement included an obligation to pay disposal fees otherwise payable by other municipalities, in the event they defaulted. The city tax to provide funds to pay the fees was held illegal. Predecessors in this office have relied on *Barnhart* in opining that a city's mortgage of property to secure the debt of a non-profit corporation would involve an unconstitutional lending of credit. *See* Op. Att'y Gen. 2006-109, 95-228. Under the arrangement you describe, holders of RMA bonds would ultimately look to county sales tax receipts for bond payment. It seems unlikely, as a practical matter, that bonds could be issued unless the bondholders were assured that the county sales tax levy would continue for as long as the bonds were outstanding, whether or not the RMA's transportation project were actually built. Because of these similarities to the facts in *Barnhart,* it is possible that a court would view an arrangement like you describe to involve the lending of the county's credit. It is also possible, however, that a court would find the prohibition to be inapplicable to a county obligation to an RMA if that obligation were issued in compliance with Amendment 62. The prohibition on the lending of credit is contained in a constitutional provision that also flatly prohibits a county from issuing "any interest bearing evidences of indebtedness . . . ." Ark. Const. art. 16, § 1. A county's lending of its credit may be seen as a way to incur debt indirectly. Amendment 62 is unquestionably an exception to the prohibition on a county's directly incurring debt. *See, e.g., City of Hot Springs v. Creviston,* 288 Ark. 286, 705 S.W.2d 415 (1986). Compliance with Amendment 62 may also make the prohibition on the lending of credit inapplicable.

that might apply, to such a transaction. I must decline to render an opinion on this question.

Question 6a – Does Arkansas Code §§ 27-76-602, 604 and 607 authorize a regional mobility authority to issue bonds to fund transportation projects of a regional mobility authority to be repaid by sales tax revenues from some but not all of the member counties?

For the reasons set forth in my response to your questions 6 and 6b, I must decline to render an opinion on this question.

I am of the view, however, that nothing in the sections of the RMA Act you refer to in your question, as those sections are currently in effect, would require each member county to provide sales tax revenues to support an RMA bond issue secured by county sales tax revenues, if the RMA Act were at some time in the future amended to permit such a bond issue. There is no requirement in the RMA Act as it currently exists that each member county support an RMA or RMA project equally or at all.

Question 7 – May a regional mobility authority use sales tax revenues generated under Arkansas Code § 27-76-601 to fund a transportation project that benefits the region as whole but does not directly benefit each member county?

This question is similar but not identical to your question 3, concerning whether an RMA project must be located in each county that is helping finance the project. But unlike question 3, where you ask what legal conclusions arise from a given fact (a project's location), here you ask what legal conclusions arise from what amounts to another legal conclusion (absence of a direct benefit). Unlike a project's location, an objective matter that is not subject to interpretation or dispute, the direct benefit, if any, accruing to a county is a subjective matter upon which reasonable people's opinions can and will differ. The presence or absence of a direct benefit to a county from a project is not clearly and unequivocally the determinative inquiry to answer the question whether a county may participate in financing that project. Additionally, your question is vague in the sense that absence of a direct benefit does not preclude there being a very substantial indirect

benefit, no benefit whatsoever, or anything between the two. My opinion on this question, therefore, is mostly speculative and of limited utility.

I have opined, as have my predecessors, that the public purpose doctrine requires that an expenditure of public money "*directly benefit* those who were taxed to pay for the expenditure." Op. Att'y Gen. 2008-026 (citing Op. Att'y Gen. 2005-102 and 2004-319, and *Chandler, supra*) (emphasis added). Notwithstanding the citation to *Chandler,* I have not located a relevant Arkansas case using the "direct benefit" formulation. It appears to have originated, in the opinions, from the language of a treatise on municipal law:

> It has been stated as regards [the public purpose] 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.

Op. Att'y Gen. 91-410 (emphasis added).

The treatise quoted in the opinion is well-respected and in its current version has been cited by the Arkansas Supreme Court on at least three occasions in the past decade. *See Morningstar v. Bush,* 2011 Ark. 350; *City of Dardanelle v. City of Russellville,* 372 Ark. 486, 490, 277 S.W.3d 562 (2008) (referring to it as "leading treatise on municipal corporations"); and *Gallas, supra* note 1.

In cases that might be argued to be analogous, the court has interpreted constitutional provisions on school finance to require that expenditures be "immediately and *directly* connected with the establishment of a common school system." *Gray,* 373 Ark. at 568 (quoting *Little River County Bd. of Educ. v. Ashdown Special Sch. Dist.,*156 Ark. 549, 556, 247 S.W. 70 (1923)) (emphasis added).

Whether a transportation project directly benefits a particular county will of course be a highly fact-dependent inquiry. I doubt that the fact that none of the project is located within the county will be solely determinative of the "directly benefit" question. In my opinion, however, there is a significant possibility that a court would find there to be no public purpose supporting a member county's

participation in the financing if there were found to be no direct benefit to that county.

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

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:JMB/cyh