



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2021-052

December 17, 2021

The Honorable Andrew Collins
State Representative
P. O. Box 21473
Little Rock, AR 72221

Dear Representative Collins:

This is in response to your request for an opinion regarding the authority of a school district to use provisions of Act 2177 of 2005 to finance the acquisition of either new school buildings or improvements to existing school buildings.

In this regard, you have provided the following factual scenario:

Act 2177 authorizes private contractors/developers ("Developers") to construct school buildings, facilities and improvements ("Projects") and, thereafter, lease them to school districts for long periods of time.

In certain instances, it is contemplated that the Developer will build a new Project meeting those specifications that the school district might identify and, upon completion of construction, the school district will then lease the facilities from the Developer over a long period of time. In other instances, the school district might opt to sell to the Developer existing facilities that will then be leased back from the Developer once material renovations have been performed.

In both instances, upon the payment of all rent due under the lease agreements, it is contemplated that the Developer will convey the improved property to the school district absent further consideration.

I have set out your 17 questions below, and will address them in the order posed.

Question 1: Is a school district required to engage in any public bidding or any other procurement process in connection with its execution of a Project development agreement with a Developer?

Question 2: Because a private Developer will be constructing the Project, must the Developer follow any public bidding or procurement laws?

Question 3: Is a school district required to engage in any public bidding or any other procurement process as a condition precedent to its execution of a Project lease agreement with a Developer?

Question 4: With regard to the above three questions, if applicable, what are the public bidding or other procurement processes that the school district must follow?

I have grouped these questions together because they all concern bidding requirements. The answer to each of the first three questions is “no.” Accordingly, no response to Question 4 is necessary.

Your questions regarding Act 2177 of 2005 (“the Act”) implicate certain portions of Ark. Code Ann. § 6-20-402 (Supp. 2021). This statute, as amended by the Act, authorizes school districts to enter into lease-purchase agreements through “public-private partnerships”:

A school district or public charter school [collectively herein, “school district”] may enter into public-private partnerships whereby the school district or public charter school enters into a lease-purchase agreement for the acquisition or construction of a school building or related facilities built or acquired by the private entities with facilities bonds [that are exempt from certain federal taxes].¹

Other relevant portions of the statute concern aspects of the lease-purchase agreement between the school district and a developer, such as the term of the

¹ Ark. Code Ann. § 6-20-402(a)(1)(B) (Supp. 2021).

agreement² and the provision of an option by the school district to terminate the agreement.³

A cardinal rule of statutory construction is that a statute is construed just as it reads, giving the words their ordinary and usually accepted meaning in common language.⁴ When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction.⁵

It is unclear from your first and third questions what part of a lease-purchase agreement, as contemplated by the statute, would need to put out for public bid. Nevertheless, based on the rules set out above, I do not see anything in section 6-20-402 that requires a school district to engage in public bidding to enter into a lease-purchase agreement with a private developer.

With respect to your second question, nothing in the relevant statute requires a private company to engage in public bidding merely because it has an agreement with a public entity. Thus, the answer to your second question is “no,” and no response is necessary to Question 4.

Question 5: Is a Developer required to engage in any public bidding or any other procurement process as a condition to Developer’s construction of a Project and granting a leasehold interest in the Project to a school district pursuant to a lease agreement?

Question 6: If so, what are the applicable public bidding or other procurement processes that the Developer must follow?

Please see my response to your second question above. A response to Question 6 is unnecessary in light of this response.

Question 7: Must a Project Developer comply with statutory and constitutional provisions applicable to the school district?

² *Id.* at § 6-20-402(b)(1)(C).

³ *Id.* at § 6-20-402(b)(2).

⁴ *See Edwards v. State*, 347 Ark. 364, 64 S.W.3d 706 (2002).

⁵ *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

It is not clear which statutory and constitutional provisions you are referencing. But given the context of your question, I gather that you are asking whether entering into a long-term lease-purchase agreement with a school district somehow makes a project developer subject to all or some of the same constitutional and statutory provisions as the school district. In short, the answer to your question is “no.”

There are certainly constitutional and statutory provisions that would guide and constrain the actions of a school district engaged in a public-private partnership with a project developer. Namely, Article 14 of the Arkansas Constitution requires the State to “maintain a general, suitable and efficient system of free public schools...”⁶ In furtherance of this constitutional directive, the General Assembly has charged the board of directors of each school district with a number of powers and duties “in order to provide no less than a general, suitable, and efficient system of free public schools.”⁷ Thus, a school district board of directors would need to remain mindful of these obligations when considering entering a public-private partnership under subdivision 6-20-402(a)(1)(B). But the developer itself would not be subject to these requirements.

Additionally, while I cannot speak to all statutory provisions that might apply to a project developer, it is worth noting that with respect to the long-term lease-purchase agreements described in subdivision 6-20-402(a)(1)(B), “[a]ll school buildings or related facilities shall comply with the requirements of the Arkansas School Facilities Manual in effect at the time the lease became effective.”⁸ This provision does not impose a mandate on the developer per se. But as a practical matter, a developer wishing to enter into a long-term lease-purchase agreement with a school district would need to ensure that buildings or facilities leased to the district meet the necessary requirements.

Question 8: Does a school district possess the statutory and constitutional right and power to enter into a Project lease agreement with a Developer?

⁶ Ark. Const. art. 14, § 1 (Repl. 2019).

⁷ Ark. Code Ann. § 6-13-620 (Repl. 2018).

⁸ Ark. Code Ann. § 6-20-402(b)(1)(C)(iii).

Question 9: If not, what are the statutory and/or constitutional provisions that prohibit or limit the school district's right and power to enter into such a Project lease agreement?

I will respond to these interrelated questions together. As explained above, section 6-20-402 sets forth a scheme whereby a school district may enter into a lease-purchase agreement with a project developer. Thus, a school district does possess the statutory authority to enter such an agreement.

With respect to whether a similar constitutional provision exists, the answer is “no.” There is no express right in the constitution for a school district to enter into a lease-purchase agreement with a developer. However, the absence of such a provision does not bear on the constitutionality of section 6-20-402. The Arkansas Constitution is a limitation on, not a grant or enumeration of, the powers of the State.⁹ As such, the General Assembly may enact legislation subject to the restrictions and limitations imposed by the state and federal constitutions.¹⁰ Furthermore, it is a well-established rule of construction that laws passed by the General Assembly are presumed to be constitutional unless judicially declared otherwise.¹¹ In this case, the legislature has statutorily authorized an arrangement that allows a school district to enter into a lease-purchase agreement with a project developer, and there are no obvious constitutional defects on the face of the statute.

Question 10: Must a Developer participate in any public bidding process in connection with the Developer's subsequent sale and assignment of a Project lease agreement to a third party?

No. Until the conclusion of the lease-purchase term, ownership of the project belongs to the Developer. And nothing in the statute prevents the Developer from selling or assigning its interest in the lease-purchase agreement. Furthermore, and

⁹ See *Wells v. Purcell*, 267 Ark. 456, 464, 592 S.W.2d 100, 105 (1979); *Jones v. Mears*, 256 Ark. 825, 828, 510 S.W.2d 857, 859 (1974); *Black v. Cockrill*, 239 Ark. 367, 369, 389 S.W.2d 881, 883 (1965).

¹⁰ *Id.*

¹¹ See *Gatzke v. Weiss*, 375 Ark. 207, 210, 289 S.W.3d 455, 458 (2008); *Ford v. Keith*, 338 Ark. 487, 494, 996 S.W.2d 20, 25 (1999); *ACW, Inc. v. Weiss*, 329 Ark. 302, 310, 947 S.W.2d 770, 774 (1997) (all holding that statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute).

similarly with Question 2 and 5 above, nothing in the statute suggests that the Developer must put its interest in the lease-purchase agreement up for public bidding prior to transferring or assigning that interest to a third party.

Question 11: Do any applicable statutory or constitutional provisions prohibit a Developer from leasing certain parts of a Project to third parties for non-school district purposes, during summer months and during non-school hours with the express prior consent and approval of the school district?

Given that school buildings and facilities may still be used by a school district during summer months and non-school hours, I gather that this question is asking about leasing certain parts of a project to third parties when those buildings or facilities are not in use by the district. With this understanding, the answer is “no.”

Subdivision 6-20-402(b)(1)(D)(i) states that “[a] school district may sublease a portion of a school building or facility whenever that building or facility is not being used for educational purposes.” Hence, a project developer may not prohibit a school district from subleasing an unused portion of the project if the school district wishes to do so. Nor does anything in this statute prevent a developer from subleasing certain unused portions of the project if the school district gives its consent.

The board of directors of a school district that is considering whether to approve of a developer’s sublease would need to bear in mind the district’s own obligation to provide “a general, suitable, and efficient system of free public schools,”¹² including its duty to ensure that “[n]ecessary and sufficient facilities are built or obtained, furnished, and maintained....”¹³ But the Arkansas Supreme Court has long interpreted section 6-13-620, which defines a school board’s powers, as granting school boards wide latitude in governing their districts, stating that “[c]ourts will not interfere in matters of detail and government of schools, unless the officers refuse to perform a clear, plain duty, or unless they unreasonably and arbitrarily exercise the discretionary authority conferred upon them.”¹⁴ Thus, absent a showing that a school board has somehow abused its discretion by

¹² *Supra* text accompanying nn.7-8.

¹³ Ark. Code Ann. § 6-13-620(7)(A).

¹⁴ *Safferstone v. Tucker*, 235 Ark. 70, 72, 357 S.W.2d 3, 4 (1962) (quoting *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538, 539 (1923)).

allowing a developer to lease out unused portions of the project to a third party, a court would likely find such an arrangement permissible.

Question 12: Can a school district convey improved real property to a Developer for nominal cash consideration pursuant to an agreement whereby the Developer will construct material improvements thereon and lease the improvements back to the school district?

Question 13: If not, what are the statutory and/or constitutional provisions that prohibit or limit the school district from selling improved real property to a Developer?

The factual nature of your question prevents me from answering with a simple “yes” or “no.” My response must therefore be limited to a discussion of what legal principles bear on a school district’s ability to convey real property.

Section 6-13-620 explicitly grants school boards the authority to sell real property on behalf of the school district.¹⁵ And while school districts must obtain bids prior to making certain purchases,¹⁶ there is no bidding requirement under state law constraining a district’s disposition of its property. Furthermore, school boards are empowered to “[d]o all other things necessary and lawful for the conduct of efficient free public schools in the school district.”¹⁷ As explained above, this statute also grants school boards considerable latitude, and courts will generally only set aside a board’s action if it has abused its discretion or acted arbitrarily, capriciously, or contrary to law.¹⁸

That said, a school board’s discretion regarding the disposition of school property is also constrained by several constitutional provisions. Article 14 of the constitution prevents the diversion of school property or funds for non-school

¹⁵ See Ark. Code Ann. § 6-13-620(6)(E).

¹⁶ See, e.g., Ark. Code Ann. § 22-9-203 (Supp. 2021) (generally requiring, *inter alia*, school districts to obtain bids for public improvement contracts where the estimated costs of the project exceed \$50,000).

¹⁷ Ark. Code Ann. § 6-13-620(11).

¹⁸ *Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 71-72, 740 S.W.2d 909, 912 (1987).

purposes,¹⁹ and Article 16 prohibits illegal exactions.²⁰ Additionally, the Arkansas Supreme Court has held that a school district's diversion of public funds to a private party may violate the due process clause of Article 2, section 8 of the constitution.²¹

Whether the proposed agreement you describe violates any constitutional or statutory provisions necessarily depends on all the surrounding facts and circumstances. If the consideration offered for the property is so minimal that the transaction is effectively a *donation*, it would probably be unlawful. Moreover, such a donation would also likely run afoul of certain statutory provisions.²²

Similarly, if the arrangement is not a donation but the consideration offered is inadequate, the sale may still constitute an unconstitutional diversion of school property or funds.²³ On the other hand, the proposed agreement might include certain conditions that a reviewing judge would find constitute adequate consideration, in which case the conveyance could potentially withstand legal scrutiny.

¹⁹ See Ark. Const. art. 14, § 2 (“No money or property belonging to the public school fund, or to this State, for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs.”); art. 14, § 3(c)(3) (“No tax levied pursuant to subsection (c)(1) of this section shall be appropriated to any other district than that for which it is levied.”).

²⁰ See *id.* at art. 16, § 11 (Repl. 2019) (prohibiting the use of tax proceeds for an unauthorized purposes); art. 16, § 13 (authorizing suits “against the enforcement of any illegal exactions whatever”).

²¹ *Chandler v. Bd. of Trustees of Teacher Ret. Sys.*, 236 Ark. 256, 258, 365 S.W.2d 447, 448 (1963) (“No principle of constitutional law is more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose.”).

²² See Ark. Code Ann. § 6-21-108 (Repl. 2018) (requiring that the property be “surplus,” that its donation “serve a beneficial educational service for the citizens of the school district,” that the recipient be a particular type of entity, and that the proposed use comply with a list of limited purposes). See also Op. Att’y Gen. 2015-105 (in addition to the criteria set forth in Ark. Code Ann. § 6-21-108, the Arkansas Constitution requires that the property donation benefit the district’s students.).

²³ See Ops. Att’y Gen. 2003-349, 93-057.

In sum, whether or not a school board may legally convey school district property to a project developer is a question that will ultimately depend on a number of factual variables, and I cannot satisfactorily answer your question in the abstract.

Question 14: Can a school district acquire a leasehold interest in a Project from a Developer in accordance with applicable statutory and constitutional provisions?

Question 15: If not, what are the statutory and/or constitutional provisions that prohibit or limit the school district from leasing a Project from a Developer?

Yes, Arkansas law permits school districts to enter into lease-purchase agreements and acquire a leasehold interest in a project as defined by the agreement.

As to your constitutional question, I refer you to my response to Questions 8 and 9 above.

Question 16: Do any statutory or constitutional provisions exist that would prohibit the Developer from entering into a third-party property and facilities management contract with regard to a Project?

Section 6-20-405 is silent on this issue, and there are no other statutory or constitutional provisions that explicitly prohibit a developer from entering into a third-party property and facilities management contract with regard to project buildings or facilities. However, as explained above, section 6-13-620 charges the board of directors of each school district with certain powers and duties, based on Article 14's mandate that the State "maintain a general, suitable and efficient system of free public schools."²⁴

These duties include "overseeing and monitoring the school district finances, including ... [e]xpenditures, [i]nvestments, ... and [r]eal property"²⁵ and ensuring that "[n]ecessary and sufficient facilities are built or obtained, furnished, and maintained."²⁶ Because there is no ownership requirement attached to these

²⁴ See *supra* text accompanying nn.7-8.

²⁵ Ark. Code Ann. § 6-13-620(6)(B).

²⁶ *Id.* at § 6-13-620(7)(A).

obligations,²⁷ a school district that has entered a lease-purchase agreement with a developer under subdivision 6-20-402(a)(1)(B) would still be responsible for making sure the project's buildings and facilities are properly managed, furnished, and maintained. Thus, if a developer enters a third-party property and facilities management contract with regard to a project, and the third party fails to adequately manage the property, the school district leasing the project from the developer could be in violation of its statutory duties.

In sum, there is no express prohibition on a developer hiring a third party to manage a project's property and facilities. But when negotiating a management contract, the school district leasing the project must be mindful of its duties under section 6-13-620.

Question 17: If a Project lease agreement contains an express provision pursuant to which the school district would have the right to terminate the lease agreement at any time and without any penalty, would the school district have the right to exclude its Project lease liability as long-term indebtedness on the School district's balance sheet and included within the school district's debt ratio calculations as provided by the provisions of Act 2177?

Subdivision 6-20-402(b)(1)(C)(ii) states that a long-term lease-purchase agreement allowed under subdivision 6-20-402(a)(1)(B) “[m]ay contain a provision allowing the school district an option to terminate the agreement *at the end of any fiscal year* for the school district.”²⁸ If the long-term lease contains such an option, it “shall not be included in the calculation of the debt ratio applicable to that school district.”²⁹

In light of this subdivision, I gather your question is whether a lease containing a provision that grants the school district an option to terminate the agreement *at any time*—not just at the end of the fiscal year—would still meet the requirements of subdivision 6-20-402(b)(1)(C)(ii), thus allowing the school district to exclude

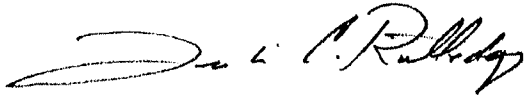
²⁷ Cf. *id.* at § 6-13-620(7)(B) (requiring the board of directors of each school district to ensure that “[a]ll properties *belonging to the district* are managed and maintained for the benefit of the school district.” (Emphasis added)).

²⁸ *Id.* at § 6-20-402(b)(1)(C)(ii)(a) (emphasis added).

²⁹ *Id.* at § 6-20-402(b)(1)(C)(ii)(b)(1). If the long-term lease does not contain such an option, it “shall be included in the calculation of the debt ratio applicable to that school district.” *Id.* at § 6-20-402(b)(1)(C)(ii)(b)(2).

the lease from the debt ratio applicable to that school district. The answer is “yes.” If a long-term lease-purchase agreement contains a provision that allows the school district to terminate the lease at any time, that provision would also necessarily allow the school district to terminate the lease “at the end of any fiscal year.”

Sincerely,

A handwritten signature in black ink, appearing to read "Leslie Rutledge", written in a cursive style.

LESLIE RUTLEDGE
Attorney General