



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 22, 2019

The Honorable Russell W. Malm  
Midland County Attorney  
500 North Loraine Street, Suite 1103  
Midland, Texas 79701

Opinion No. KP-0237

Re: Whether a county may provide funding to a school district for grounds maintenance, a library, and law enforcement and funding to a hospital district for purchase of a mental health facility (RQ-0240-KP)

Dear Mr. Malm:

You seek an opinion on the “ability of a county to enter into a written agreement to pay money to certain entities.”<sup>1</sup> Specifically, you are interested in Midland County’s (the “County”) authority to pay funds to a public school district for grounds maintenance, library, and law enforcement purposes. *See* Request Letter at 1. You also ask about the County’s authority to provide funds to the county hospital district to purchase a building to be used as a mental health facility. *See id.*

The County’s proposed expenditure of public funds implicates article III, section 52(a) of the Texas Constitution, which provides “the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.” TEX. CONST. art. III, § 52(a). Article III, section 52(a)’s purpose is to “prevent the gratuitous grant of [public] funds to any individual, corporation, or purpose whatsoever.” *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928). “Section 52(a) has been construed to prohibit political subdivisions such as counties from gratuitously granting its funds to another political subdivision.” Tex. Att’y Gen. Op. No. GA-0664 (2008) at 2; *see Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 842–43 (Tex. 2000) (determining that article III, section 51 and 52 would not permit a city to gratuitously pay “the City’s ‘public money’” to a school district), *San Antonio Indep. Sch. Dist. v. Bd. of Trs. of San Antonio Elec. & Gas Sys.*, 204 S.W.2d 22, 25 (Tex. Civ. App.—1947, writ ref’d n.r.e.) (holding that under article III, sections 51 and 52 a “city cannot donate its funds to an independent municipal corporation such as an independent school district”). Spending public funds for a legitimate public purpose to obtain a clear public benefit, however, is not an unconstitutional grant of public funds. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995); *see also Barrington v. Cokinos*, 338 S.W.2d 133, 140 (Tex.

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<sup>1</sup>Letter from Honorable Russell W. Malm, Midland Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (July 17, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

1960) (stating that an expenditure which incidentally benefits another party is not invalidated under the Constitution if made for the direct accomplishment of a legitimate public purpose).

In *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, the Texas Supreme Court articulated a three-part test by which to determine whether an expenditure or transfer of public funds satisfies article III, section 52(a). 74 S.W.3d 377, 384 (Tex. 2002). The test requires that (1) the predominant purpose of the expenditure is to accomplish a public purpose, not to benefit private parties; (2) the public entity must retain sufficient control over the expenditure to ensure that the public purpose is accomplished; and (3) the public entity receives a return benefit. *See id.* The determination whether a particular expenditure satisfies the three-part test is for the political subdivision to make in the first instance, subject to judicial review for abuse of discretion. *See Tex. Att'y Gen. Op. Nos. KP-0204 (2018) at 2, KP-0007 (2015) at 2.*

Regarding the first prong, “[t]he public purpose to be served is not the general good of the public, but a specific purpose of the” public entity making the expenditure. *Tex. Att'y Gen. Op. No. KP-0204 (2018) at 3.* And as a Texas county has only those powers specifically conferred on it by statute or the Constitution, the expenditure must be for something within the County’s powers. *See Guynes v. Galveston Cty.*, 861 S.W.2d 861, 863 (Tex. 1993), *State ex rel. Grimes Cty. Taxpayers Ass’n v. Tex. Mun. Power Agency*, 565 S.W.2d 258, 265 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism’d). Generally, the use of county funds to fulfill a statutory function of the county serves a public purpose of the county. *See Tex. Att'y Gen. Op. No. KP-0104 (2016) at 2* (determining that a county using public funds to purchase flags for display in front of local businesses on holidays served a county purpose because the county was acting within its statutory authority to display the United States flag on specific holidays). As to the second prong, a political subdivision may retain public control over the funds by entering into an agreement or contract that imposes upon a recipient of public funds the obligation to accomplish the public purpose.<sup>2</sup> *See Tex. Att'y Gen. Op. No. KP-0091 (2016) at 2.* Such an agreement or contract could also ensure a political subdivision receives the return benefit in satisfaction of the third prong. *See id.* at 2–3 (“The return benefit received by the county need not be monetary, but could instead be the accomplishment of the county’s public purpose.”).

As previously noted, it is for the county commissioners court to determine in the first instance whether the proposed expenditures satisfy article III, section 52(a). *See Tex. Att'y Gen. Op. No. GA-0664 (2008) at 4.* You posit that each proposed expenditure “fits within a power granted to counties by the Texas Legislature.” Request Letter at 2. You argue that the proposed expenditures are valid because Texas Constitution article V, section 23 authorizes a county to provide law enforcement services through the sheriff’s office; Local Government Code section 323.001 authorizes a county to operate libraries; and Local Government Code section 331.001 authorizes a county to operate parks. *See id.* at 1–2. While you are correct that a county possesses certain law enforcement, library, and park authority, the predominant purpose of the proposed

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<sup>2</sup>Chapter 791 of the Government Code governs interlocal contracts. *See TEX. GOV’T CODE §§ 791.001–037.* Among other things, chapter 791 provides that an interlocal contract may be to “provide a governmental function or service that each party to the contract is authorized to perform individually.” *Id.* § 791.011(c)(2); *see also Tex. Att'y Gen. Op. No. GA-0917 (2012) at 1* (“Thus, unless both governmental entities that would be parties to the proposed contract are specifically and individually authorized to perform the contract, the Government Code does not authorize the governmental entities to enter into the contract.”).

expenditures to the school district must nonetheless serve a county purpose. *See, e.g.*, Tex. Att’y Gen. Op. Nos. KP-0204 (2018) at 3, JC-0432 (2001) at 2. Thus, with respect to each proposed expenditure, the question for the commissioners court is whether providing funds for law enforcement services, grounds maintenance, and a library for an independent school district serves a specific county purpose.

Next, we consider the County’s proposed expenditure of funds to a hospital district to purchase a building for use as a mental health facility. *See* Request Letter at 1. You refer to Health and Safety Code section 263.021 as general authority for a county to provide funds for a building to provide a mental health facility. *See id.* at 3; *see also* TEX. HEALTH & SAFETY CODE § 263.021(a) (authorizing a county to establish a “county hospital or any medical or other health facility”). You also refer to provisions in the Health and Safety Code authorizing a county to provide mental health services. *See* Request Letter at 3; *see also* TEX. HEALTH & SAFETY CODE §§ 615.001 (requiring a county commissioners court to support county residents with mental illness or intellectual disabilities), 534.001 (authorizing a county to establish and operate a community center to provide mental health services). To the extent the proposed expenditure is for the County to purchase a building for a county hospital or to provide mental health services to county residents, a court would likely find the expenditure within the scope of a county’s statutory authority and serves a county purpose.

Yet, in your letter you state that the proposed recipient of the County’s funds is a county hospital district. *See* Request Letter at 3. To the extent the recipient of the proposed expenditure is a county hospital district, article IX, section 9 would generally prohibit the County from levying a tax or issuing bonds or other obligations for hospital purposes or providing medical care within the boundaries of the hospital district. *See* TEX. CONST. art. IX, § 9; *see also* TEX. SPEC. DIST. CODE §§ 1061.102 (providing that “[a] political subdivision of this state, other than the district, may not impose a tax or issue bonds or other obligations for hospital purposes or to provide medical care in the district”), 1061.002 (providing that the Midland County Hospital District “is created under the authority of Section 9, Article IX, Texas Constitution”). We must consider this prohibition in connection with article IX, section 13, which was enacted after article IX, section 9, to permit political subdivisions to participate in the provision of mental health services. *See* TEX. CONST. art. IX, § 13; *see also State v. Brownson*, 61 S.W. 114, 115 (Tex. 1901) (“Being the last expression of the will of the people, any provisions of the constitution previously existing must, if in conflict, yield to it.”). Article IX, section 13 states that “unless a statute creating a hospital district shall expressly prohibit participation by any entity other than the hospital district in the [provision] of mental health services . . . within or partly within the boundaries of any hospital district,” any political subdivision within the hospital district may participate in the provision of mental health care services and “may . . . expend public moneys for such proposes as provided by law” if otherwise authorized to do so. TEX. CONST. art. IX, § 13; *see* Tex. Att’y Gen. LO-88-33 (1988) at 3. Chapter 1061 of the Special District Code does not expressly prohibit a political subdivision within the hospital district from participating in the provision of the services listed in article IX, section 13. *See* TEX. SPEC. DIST. CODE §§ 1061.001–.256; *see also* Tex. Att’y Gen. LO-88-33 (1988) at 3–4, Tex. Att’y Gen. Op. No. H-454 (1974) at 4. And provisions in the Health and Safety Code authorize a county to provide mental health services to county residents. *See* TEX. HEALTH & SAFETY CODE §§ 534.001 (providing for county establishment of community center to provide mental health services), 615.001 (“Each commissioners court shall provide for the support

of a person with mental illness” who is a county resident unable to provide self-support or be admitted to a state mental health hospital or facility.). Accordingly, a court would likely determine that the County may provide county funds to a county hospital district to purchase a building to be used as a mental health facility.

S U M M A R Y

Article III, section 52(a) of the Texas Constitution prohibits the expenditure of county funds for private purposes unless the county (1) ensures the predominant purpose of the expenditure is to accomplish a public purpose of the county, not to benefit private parties; (2) retains sufficient control over the public funds to ensure the public purpose of the county is accomplished; and (3) ensures the county receives a return benefit.

Whether a particular expenditure satisfies this three-part test is a determination for the county commissioners court in the first instance subject to judicial review. With respect to the proposed expenditures to a school district, the specific question for the commissioners court is whether providing law enforcement services, grounds maintenance, and a library for an independent school district serves a specific county purpose.

Under article IX, section 13, of the Texas Constitution, a court would likely determine that the County may provide county funds to a county hospital district to purchase a building to be used as a mental health facility.

Very truly yours,



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