

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 12-31

Use of County Funds to Support Referendum to Increase Local Option Sales Tax

QUESTION

Is a county commission or a county mayor authorized to spend county funds to advertise support for a referendum on whether to increase the local option sales tax?

OPINION

No state statute specifically authorizes the use of funds for this purpose. Absent such specific authorization, neither a county commission nor a county mayor may use county funds to pay for communications that advocate for or against adoption of a measure in a local referendum.

ANALYSIS

This opinion concerns whether a county commission or county mayor is authorized to spend county funds to advertise their support for a proposed local option sales tax increase. Under Tenn. Code Ann. § 67-6-702, a county or city may authorize the levy of a local option sales tax. The tax must be approved in a referendum of the county or city voters. Tenn. Code Ann. § 67-6-706.

No statute explicitly authorizes the county mayor or county commission to use county funds to advertise their position on the referendum. Under Tenn. Code Ann. § 5-1-118(a), counties may exercise the same powers granted to cities under various provisions of Title 6 of the Tennessee Code Annotated. These sections include Tenn. Code Ann. § 6-2-201(7), which provides:

Every municipality incorporated under this charter may:

* * * *

(7) Expend the money of the municipality for all lawful purposes;

Municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes. *Allmand v. Pavletic*, 292 S.W.3d 618, 625 (Tenn. 2009). If there is any fair doubt as to whether a local governmental entity

possesses a particular authority, courts should resolve that doubt against the existence of the authority. *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706, 710 (Tenn. 2001) (school board's statutory authority to submit a construction contract to arbitration was implied by the express statutory authority to enter into construction contracts in Tenn. Code Ann. § 49-2-203). Further, under Article II, Section 29, of the Tennessee Constitution, county taxes must be imposed and expended for a legitimate county purpose. *Davidson County v. Kirkpatrick*, 150 Tenn. 546, 548, 266 S.W. 107, 108 (Tenn. 1924). What constitutes a legitimate county purpose must necessarily be decided in view of the facts of each particular case. See, e.g., *Edmondson v. Board of Education*, 108 Tenn. 557, 563-64, 69 S.W. 274, 275-76 (Tenn. 1902).

We have found no Tennessee authority that addresses this specific issue. Courts in other states have generally found that, absent explicit statutory authority, a local government is not authorized to spend public funds to advertise its position for or against an issue being presented to the voters in a referendum. See, e.g., *Mines v. DelValle*, 201 Cal. 273, 286-87, 257 P. 530, 536-37 (Cal. 1927), *overruled in part on other grounds*, *Stanson v. Mott*, 130 Cal. Rptr. 697, 551 P.2d 1 (Cal. 1976) (bond issue and local initiative); *Elsenau v. City of Chicago*, 334 Ill. 78, 81-2, 165 N.E. 129, 131 (1929) (municipal bond issue); *Citizens to Protect Public Funds v. Board of Education of Parsipanny-Troy Hills TP*, 13 N.J. 172, 180-81, 98 A.2d 673, 677-78 (1953) (school bond issue); *Porter v. Tiffany*, 11 Or. App. 542, 549-50, 502 P.2d 1385, 1388-89 (1972) (bond issue and initiative measure). The rationale for these decisions vary. In *Elsenau*, the Illinois Supreme Court found that “[t]he conduct of a campaign, before an election, for the purpose of exerting an influence upon the voters, is not the exercise of an authorized municipal function and hence is not a corporate purpose of the municipality.” *Elsenau* 165 N.E. at 131. In *Citizens to Protect Public Funds*, the New Jersey Supreme Court concluded that the use of public funds to support one side in a local referendum was unfair to proponents of the other side. As the New Jersey Supreme Court stated:

The public funds entrusted to the [school] board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.

Citizens to Protect Public Funds, 98 A.2d at 677. Subsequent court decisions have expressed similar concerns. See, e.g., *Palm Beach County v. Hudspeth*, 540 So.2d 147, 154 (Fla. Ct. App. 1989) (stating a county can only use tax dollars to fairly educate the public on a referendum, and cannot use such funds to “pick up the gauntlet and enter the fray”).

Accordingly, for the aforementioned reasons, this Office concludes that Tennessee law does not currently explicitly authorize a county commission or a county mayor to use county funds to pay for communications that advocate for or against adoption of a measure in a local referendum.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

The Honorable Ken Yager
State Senator
Suite 6, Legislative Plaza
Nashville, Tennessee 37243

The Honorable Dennis Powers
State Representative
202 War Memorial Building
Nashville, Tennessee 37243