



From: Elisha Hodge, MTAS Legal Consultant  
To: Mayor and City Attorney  
Re: Municipality paying city attorney fees for residents who sued the municipality  
Date: September 23, 2022

In late July, I was asked to reexamine the opinion I provided in September 2021, which is included below, because a constituent who is advocating for the Town to pay for the attorney's fees for 3 private residents who successfully sued the Town stated that I was not provided all pertinent information when I was originally asked to opine on the legality of such expenditure. The additional information that I was asked to review is attached. You and I subsequently scheduled a time to discuss this matter and on Friday, September 2, 2022, we spoke over the phone. As I stated during our phone conversation on September 2, 2022, there is nothing in the attached documents that alter the opinion that I gave below on September 14, 2021. While it is true that 3 residents successfully challenged the actions of the BOMA related to the passage of Ordinance 2019-331, which approved a rezoning request for a proposed development within the town, it is not unheard of for residents to successfully challenge decisions made by municipalities. However, I find no legal precedent or authority allowing a municipality to expend public funds, in accordance with the public purpose doctrine, on the legal fees incurred by such residents who successfully challenge the actions taken by municipal officials.

The attached Memo on Town Authority (hereinafter "memo") references the section from *McQuillin* that provides, "[t]he test of a public purpose is whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. *McQuillin, Law of Municipal Corporations* § 39.19 (3rd. Ed. 1993)."

The attached memo also references *Smith v. City of Pigeon Forge*, 600 S.W.2d 231 (1980). While the facts of the case are not on point with the facts of the situation that is the subject of this inquiry, the analysis of the court is helpful in determining whether the requested expenditure for the payment of attorney's fees complies with the public purpose doctrine. In the case, the governing body for the City of Pigeon Forge passed an ordinance requiring seventy-five percent of the gross receipt tax collected in the City to be spent in a manner that directly or indirectly benefited the business community and tourism in general. *Id.* at 232. The court opined as follows with regard to the expenditure:

The express language of Pigeon Forge ordinance 143 mandates the use of seventy-five percent of the tax revenue for the benefit of the business community and tourism, leaving the public at large with only the remote hope that it may derive some incidental benefit from the promotion of private business enterprises wherein neither it nor its representatives have any participation in management or profits.

We hold that section 4(b) of the Pigeon Forge ordinance allocates tax revenues beyond the pale of a public purpose in violation of Tennessee Constitution Article 2, Section 29 and the decisions of this Court.

Smith v. City of Pigeon Forge, 600 S.W.2d 231, 233 (Tenn. 1980)

In the situation that is the subject of this inquiry, one hundred percent of the expenditure of public funds would be for the benefit of the 3 private residents who successfully sued the Town, with no “direct benefit of reasonably general character” being conferred “to a significant part of the public.” As such, the requested expenditure is not for a public purpose in my opinion. Spending public funds in the manner requested would be a violation of the public purpose doctrine and inconsistent with section 6-2-201 of the Town’s charter which authorizes the Town to “[e]xpend the money of the municipality for all lawful purposes.”

It is important to note that the position advanced in the attached memo is that the expenditure of public funds to pay attorney’s fees for the 3 private individuals is allowed, not because the payment is consistent with the public purpose doctrine, but rather because the actions taken by the members of the MPG, which includes the 3 members who incurred the attorney’s fees, in “ensuring that the Board follows state law; ensuring that the Board follows the WZO and applies the WZO in good faith; maintaining the integrity of the WZO for future application; preserving the character of the Town as described in the WZO; and correcting an illegal, arbitrary, and capricious action of the Board” benefited “the community as a whole” and therefore constitutes a public purpose. However, this position is not consistent with the manner in which the courts in Tennessee analyze whether an expenditure is for a public purpose.

Additionally, while there is significant discussion in the attached memo about the Town being authorized, pursuant to Tenn. Code Ann. § 6-54-111, to appropriate public funds to the corporation for reimbursement of attorney’s fees incurred by the corporation after the group “initiated” the lawsuit challenging Ordinance 2019-331, the corporation was not a named petitioner in the lawsuit. Instead, 3 private residents were the named petitioners. It appears that corporation would be serving as a passthrough for funds that would ultimately be provided to the petitioners to pay their attorney’s fees. I do not find any provision within State law that authorizes the type of arrangement described. In fact, Tenn. Code Ann. § 6-54-111, which authorizes municipalities to appropriate funds to certain nonprofits, provides that “[e]ach legislative body of a municipality shall devise guidelines directing for what purpose the appropriated money may be spent. **These guidelines shall provide generally that any funds appropriated shall be used to promote the general welfare of the residents of the municipality.**” (emphasis mine) The Town appropriating money to MPG for payment of the 3 private residents attorney’s fees conflicts with the requirement that all appropriated funds “be used to promote the general welfare of the residents of the municipality.”

For each of the above-cited reasons, the Town does not have the authority to use public funds to pay for the attorney’s fees of the 3 private residents who successfully challenged the passage

of Ordinance 2019-331, in my opinion. Again, you might want to reach out to the Town's auditor and Comptroller's office about this issue as well.

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Email referenced throughout above:

From: Elisha Hodge, MTAS Legal Consultant  
To: City Attorney, Mayor, MTAS Consultant  
Date: September 14, 2021

Good afternoon. In my opinion, spending public funds to pay the attorneys fees of private individuals who sued the Town is a violation of the public purpose doctrine and would result in the illegal expenditure of public funds. [Here](#) is the link to an opinion on the MTAS website that addresses the public purpose doctrine. Please see the first paragraph of the analysis specifically. I also agree with your city attorney regarding Dillion's Rule and the application of it to this situation.

However, if the Town officials feel strongly about paying the attorney's fees, I suggest that the Comptroller's office be contacted for an opinion, as well.

Please let me know if you would like to discuss this.