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**TO: JEFF WEBSTER  
EXECUTIVE DIRECTOR  
EXCELLERATE FOUNDATION**

**DATE: JUNE 14, 2023**

**RE: DONATION OF LAND BY PUBLIC SCHOOL SYSTEM**

Excellerate Foundation asked us to review Arkansas law to evaluate whether a public school district, specifically the Bentonville School District, in the State of Arkansas may donate land adjacent to the high school for the development of affordable housing to benefit citizens of the school district. As further set forth below, we believe there is a reasonable and good faith position that the Bentonville School District (“School District”) could donate such land to a non-profit corporation for the purposes of developing affordable housing to benefit teachers, school employees, and others in the Bentonville community.<sup>1</sup>

The Arkansas Code<sup>2</sup> and the Arkansas Constitution<sup>3</sup> allow for a school district to donate land provided certain requirements are met. Specifically, (i) the School District must make a determination that (a) the real property is not required for the present or future needs of the school district and (b) the donation of the real property serves a beneficial educational service for the citizens of the School District; (ii) the real property is donated to a Qualified Donee (as defined below), which includes a not-for-profit organization; (iii) the real property is donated for the purposes of (a) having the real property preserved, improved, upgraded, rehabilitated, or enlarged or (b) providing community programs and beneficial educational services, social enrichment programs, or after-school programs; and (iv) the donation of such land will benefit the students of the School District.

## **I. Arkansas Code Annotated**

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<sup>1</sup> In addition to the Constitutional and Statutory analysis identified in this Memorandum, in any donation of real property for purposes of development of affordable housing in Bentonville, it will be important to confirm that the real property is not otherwise encumbered by financing or other restrictive covenants.

<sup>2</sup> ARK. CODE ANN. §6-21-108.

<sup>3</sup> ARK. CONST. art. XIV, §§ 1-2.

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## **a. Determination that the Property is not required for present or future needs**

Here, the Arkansas Code requires the School District to make a determination as to the present or future needs of the school district.<sup>4</sup> If the land is not currently being used by the School District, nor is it anticipated that the land will be necessary to the School District in the future, then this likely meets the requirement that the land is indeed surplus.<sup>5</sup> In evaluating whether the Greenland School District could donate surplus school property to the Winslow Community Center Association, the Arkansas Attorney General opined that the determination by the school board that the building and property are not being used by the district and are not anticipated to be used by the district was sufficient to meet the requirements of the statute.<sup>6</sup>

Here, the School District would need to identify the land that it would donate and affirmatively determine that the land is indeed surplus and has no future intended use.

## **b. Beneficial Educational Service**

Next, the School District will need to determine that the donation of the real property will serve a beneficial educational service for the citizens of the School District.<sup>7</sup> The statute does not clarify what constitutes a “beneficial educational service for the citizens of the school district.”<sup>8</sup>

While the Arkansas Code is silent as to what constitutes a beneficial educational service, we understand that teaching candidates have declined offers to relocate to Bentonville and teach in the School District because the teachers cannot afford the high rental rates or to purchase a home in the School District; therefore, the School District is losing qualified candidates for teaching positions. We believe there is a reasonable correlation between donating the land for the development of affordable housing to be made available to School District employees and an anticipated beneficial educational service to citizens of the School District - that of hiring teachers to service the School District. By using land to develop affordable housing available to employees of the School District, the School District is providing a benefit to its employees and encouraging long-term stability which will benefit the Bentonville educational system.

## **c. Listed Donee**

The Arkansas Code requires that the donation be to a “publicly supported institution of higher education, a technical institute, a community college, a not-for-profit organization, a county, a city, an incorporated town, or any entity thereof”<sup>9</sup> (a “Qualified Donee”). In *Attorney General Opinion 2015-105*, the Greenland School District desired to donate land to the Winslow Community Center, a purported not-for-profit organization organized exclusively for educational

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<sup>4</sup> ARK. CODE ANN. §6-21-108(b)(1).

<sup>5</sup> See Ark. Op. Att’y Gen. 2015-105; Ark. Op. Att’y Gen. 2017-105.

<sup>6</sup> Ark. Op. Att’y Gen. 2015-105.

<sup>7</sup> ARK. CODE ANN. § 6-21-108(b)(1)(c).

<sup>8</sup> *Id.*

<sup>9</sup> ARK. CODE ANN. § 6-21-108(b)(1).

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purposes under section 501(c)(3) of the Internal Revenue Code.<sup>10</sup> Here, Excellerate Foundation or another not-for-profit corporation would be considered a Qualified Donee.

## **d. Limited Purposes**

The donated real property must be used for one of the three limited purposes: (i) having the real property preserved, improved, upgraded, rehabilitated, or enlarged by the donee,<sup>11</sup> (ii) providing a publicly supported institution of higher education, a technical institute, or a community college with the donated property in which to hold classes,<sup>12</sup> or (iii) providing community programs and beneficial educational services, social enrichment programs, or after-school programs.<sup>13</sup>

Here, the proposed development of affordable housing to be available to School District employees and citizens would reasonably be considered to be improving or upgrading the real property. Moreover, as noted above, we believe there is a reasonable position that making affordable housing available to School District employees will increase the School District's ability to recruit, hire and retain talented teachers and other school administrators for the benefit of the School District's educational system.

## **II. Constitutional Analysis**

In addition to meeting the requirements of Ark. Code Ann. § 6-21-108, any donation by the School District of real property must also meet the requirements of the Arkansas Constitution. While A.C.A. § 6-21-108 requires the educational benefit be for the citizens of the school district, the Arkansas Constitution is narrower and requires a benefit to *students* of the district.<sup>14</sup>

In *Attorney General Opinion 2015-105*, the Attorney General found that the donation by the Greenland School District appeared to benefit the students when facts were provided that the monthly budget would be improved by eliminating payments for unused buildings, thus creating a "cash-flow" benefit.<sup>15</sup> In considering whether the benefit to the students must come through the sale of the property, the Attorney General concluded "[t]here is no clear basis in the constitution itself or in relevant case law for suggesting that the constitution absolutely requires sale, rather than donation, of property having some market value."<sup>16</sup> This position was reiterated in 2017.<sup>17</sup>

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<sup>10</sup> Ark. Op. Att'y Gen. 2015-105.

<sup>11</sup> ARK. CODE ANN. § 6-21-108(b)(1).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> ARK. CONST. art. XIV, §§ 1-2; *Fort Smith Sch. Dist. v. Beebe*, 2009 Ark. 333, 11-12, 322 S.W.3d 1, 7-8 (citing *Lake View Sch. Dist. No. 25 v. Huckabee*, 362 Ark. 520, 210 S.W.3d 28 (2005)).

<sup>15</sup> Ark. Op. Att'y Gen. 2015-105.

<sup>16</sup> Ark. Op. Att'y Gen. No. 2015-105.

<sup>17</sup> "It is my opinion that the validity of a donation does not depend upon the property being unmarketable." Ark. Op. Att'y Gen. No. 2017-105.

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Therefore, if an educational benefit can be shown to aid the students within the School District, this constitutional requirement will be met. We believe there is a reasonable and good faith argument that donation of real property to be developed into affordable housing for the use and benefit of School District employees will benefit the students of the School District by promoting recruitment, hiring and retention of School District employees, who might otherwise choose to work somewhere else with more affordable housing options. There may also be specific benefit to students of the School District whose families qualify to move into the developed property.

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This Memorandum was developed for the benefit of our client, Excellerate Foundation, to evaluate the possible means by which Bentonville School District may donate certain specified real property to promote the development of affordable housing in the Northwest Arkansas area. This is not intended as legal advice for any particular school district and any school district evaluating such donation should engage its own legal counsel.