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July 10, 2018
Via Email to tngenrep@lcs.net

*Manchester Times
Attn.: Editor
300 North Spring Street
Manchester, TN 37355*

*The Tullahoma News
Attn.:
P.O. Box 400
Tullahoma, TN 37388*

Editor

RE: Letters to the Editor Column

Dear Editors:

It would appear that in the last year or so, there have been a number of articles in both referenced newspapers written by Elena Cawley raising questions about the financial losses occurring at the Public Building Authority and raising question as to why the County and/or City has not sold or terminated the Conference Center and the Public Building Authority. Likewise, there were a number of residents of the County present at the June 26th Coffee County Commission meeting raising their legitimate concerns of like nature about the ongoing loss of funds through the operation of the Conference Center. In regard to the questions that were raised during the referenced County Commission meeting, I as County Attorney, attempted to address the legal aspects of those questions. Those questions were legitimate concerns of not just those present expressing them, but others in the County as well and due to the fact that a very small part of the populace of the County would have seen or heard those responses, the Mayor has asked that I write a letter addressed to the newspapers to provide that information to the general public.

I apologize in advance for the length of this response and I realize I tend to be long winded, but since this is a matter of broad public concern and concerns a significant amount of financial loss, it warrants the time and attention to address the matter thoroughly. The Public Building Authority, which is a legal entity established in 2000 by Charter from the State of Tennessee, and is the operating entity of the Manchester-Coffee County Conference Center. Likewise the agreement which currently obligates Coffee County and the City of Manchester to equally support

the Conference Center was likewise executed in 2000. The opening paragraphs of the agreement provides as follows:

"Whereas, the County and City have determined that it is in the public interest that a conference center be built to further business, industry and growth within Coffee County, Tennessee and Manchester, Tennessee; and

Whereas, the parties are in agreement to fund, on equal basis, the construction, equipping, and operation of said Conference Center."

That instrument was executed by the then Coffee County Executive of Coffee County and the then sitting Mayor of the City of Manchester, having been approved by the Coffee County Commission and the Manchester Board of Mayor and Alderman. The only logical interpretation of the agreement and documents available reflect that the two (2) governmental entities fully recognized that a conference center could be a great benefit to both City and County, but that it would take some time to get it financially on its feet and it would need the support of the two (2) governmental entities to do so. Since each entity felt it would be good for the community, but they didn't want to bear the expense alone, they entered into the joint venture, assuming equal responsibility. It would appear that was because neither one of the two (2) entities wanted to be stuck holding the bag by themselves. I'm satisfied that each entity and its officials entered into the agreement believing that what they were doing was going to be in the best interest of this community. Regrettably, sometimes things don't work out as we hoped they would, despite one's best efforts.

Paragraph 5 of the agreement provides "It is contemplated by the parties that the Public Building Authority shall operate the Conference Center following acquisition. Net profits and losses attributable to the operation of the Conference Center, both in acquisition and operation thereafter, shall be borne equally by the parties hereto." Remember the signatory parties to this agreement are Coffee County and the City of Manchester.

Thus raises the question that since it's been in existence for a number of years and it's still losing money, why can't the County just close it, sell it or otherwise get rid of it? The answer to that question is the law of the State of Tennessee prohibits it. The Public Building Authority was established under the Charter pursuant to Tennessee Code Annotated § 12-9-101 et seq., which Code sections provide authority for a governmental entity such as the City of Manchester or Coffee County to establish a Building Authority for such improvements and developments within a governmental entity. But in authorizing a City or County individually or the two (2) working together to establish such a Building Authority, the State law likewise establishes provisions under which it must operate and that is under a Board of Directors, which are, in fact, appointed by the governmental entity; however, those directors or that Board must be independent of the governmental entity that established it. Not only that, but the statute prohibits a member of the County Commission or a member of the Manchester Board of Mayor and Aldermen from being appointed to sit on the Board. When issues arose about the financial operation a couple of years ago, both the City of Manchester and Coffee County looked about having members of the County Commission and the Manchester Board of Mayor and Aldermen included on the Public Building

Authority Board to have some control of its operation, but upon researching the matter, it was determined that the State law prohibited it.

Well, why not just close it? The reason we can't just close it as the City or the County or both is that by law it's under the control and operation of the Public Building Authority under which it was created. It is that Board or entity that has authority to decide whether to secure a private operator to run the Conference Center or to continue its direct operation. It is the PBA's decision whether or not to terminate the PBA, but even it can do so only if all of its debts were resolved and the purpose of its existence had been satisfied.

In the agreement between the City and County, and in particular Paragraph 6 of that agreement, it provides that each entity, the City and the County, are relying upon the other one to bear their portion of the expenses and if they fail to do so, the other entity can sue them and require them to fulfill that obligation and also recover attorney's fees from them for their failure to comply with the agreement.

In numerous articles in both papers, it is pointed out by Ms. Cawley, that Gerald Ewell, the City Attorney for the City of Manchester, had advised her that in his opinion the County and the City could by agreement between the two (2) of them terminate the agreement after one (1) year. First of all, let me say that Gerald Ewell is a very thorough and competent attorney and a very technical attorney. When I saw the articles in the paper about a year ago in regard to that contention, I thought great, Gerald has found something that will help us solve this matter and I need to find out what it is. So I called him and he advised me of the statute upon which he was relying for the 1-year termination. He advised it was T.C.A. § 12-10-108. I read that statute and it does, like was reported in the paper, address authority to make contracts for up to a year and certain other limitations, but when examined more closely, that section does not appear, in my opinion, to apply to our fact situation. The section that was referenced of the Tennessee Code Annotated which deals with the limitation of one (1) year was not addressing the powers and authority of the Public Building Authority Board, but rather was addressing the powers and authorities that could be given to an executive committee appointed by the Public Building Authority Board. It did not in any way limit the power to the PBA, but only limited the authority they could delegate to an executive committee, if they had one, and the Coffee County PBA doesn't even have an executive committee; they operate under the direct operation of the full Board. So with all due respect, I don't think that Code section provides an out for Coffee County or the City of Manchester.

There is a section in the Code that could have been a protection or an out for the City or the County and that section is T.C.A. § 12-10-114 – Non-Liability of Municipality. Sub-section (a) of that Code section provides that the governmental entity establishing the Public Building Authority shall not be liable for the payment of obligations of the created entity and that PBA's actions cannot bind the governmental entity, city or county. Why then is the City and County liable? Because subsection (b) of that Code section provides notwithstanding the first part, a municipality, city or county, may by contract agree to indemnify costs, claims and losses, etc.; and if they did so, the contract would be enforceable against the municipality in accordance with its terms. In other words, if you enter into a contract to be responsible for all or a portion of the expenses, your obligation is set by the terms of the contract. General case law, not only in

Tennessee, but in most all states in regard to contracts, generally provide that it's "the intent of the parties in making the contract" that will control and you look to the language of the contract to see if you can discern the intent of the parties.

As I stated in the Commission meeting in response to questions about ability to terminate the contract, it is my opinion that the City and County can cease obligation for the expenses of the Conference Center once the underlying bonds are paid off. The underlying bonds currently have about three (3) more years of payments and the City and the County had equal amounts of bonds for which they obligated themselves under their agreement with the bonding company for this Conference Center. The basis for my advice that at that time the parties can change the arrangement is found in the wording of the contract itself; and I will quote a portion of Paragraph 6 of the contract which spells it out:

"It is contemplated by the parties that this venture shall continue for an initial term of years necessary to liquidate and pay the bonding indebtedness incurred by the Public Building Authority for the acquisition of the Conference Center and personal property used in conjunction therewith, and that it may be continued thereafter under such terms as the parties may agree upon."

The language just quoted in my opinion sets out the intent of the parties. That the City and County are agreeing to pay the underlying support – pay the bonds and pay the shortfall on operating expense equally – until we get those bonds paid off. After those bonds are paid off, the only obligation will be what agreements we (the County and/or City) make at that time, if we make any agreement at that time.

There is another issue that is present in this matter which I will address herein. The law of Tennessee generally is that only a party can sue on a contract to enforce it, and in this case, the two (2) parties to the actual contract about paying expenses are the City of Manchester and Coffee County. The PBA is not a signatory to that agreement, but there is an exception in the law whereby a non-party to a contract can sue to enforce the terms of the contract, and that is, if the third party, or non-party, is a beneficiary of the contract. Such an entity or person is called a third-party beneficiary. In Tennessee the requisites necessary to establish a third-party beneficiary relationship are (1) a valid contract made with sufficient consideration between the promisor and promisee and (2) the clear intent to have the contract benefit a third party. Since every contract that a governmental entity enters is made for the benefit of all of its citizens, in order for there to be a third-party beneficiary that is entitled to sue on a government contract, there must be language in the contract that indicates that the parties intend to confer a direct benefit to certain citizens or entities to make them third-party beneficiaries. Mr. Ewell has expressed to me that he has reservations about the Conference Center or PBA qualifying as a third-party beneficiary. I fully respect Mr. Ewell's opinion, for as I stated above he is very detailed and very knowledgeable, but from my reading of this contract, the whole purpose of this contract was to finance a conference center that was to be controlled by the Public Building Authority and to guarantee its financial solvency until it could stand on its own or at least until the bonds were paid off. That's where we are and how we got to where we are and that's why I have given the advice, I have given to the County to the effect that I believe we are bound until these bonds are satisfied.

Where I do have a questions is, what if one of the entities, either the City or the County, wanted to get out of the support obligation and were willing and able to pay off their half of the bonds, would they then be relieved if the other governmental entity had not paid off their portion. That is the part that to me is an uncertainty. I could see a ruling either way on that issue. I think it's reasonably clear that if both the City and the County got their portions of the bonds paid off, they are free to re-contract, renegotiate or get out completely, but if only one pays off, that raises another legal question.

What are the potential solutions? By statute, Charter and contract the Public Building Authority is the corporate entity in charge of the operation of the Conference Center. That Board could make a decision to secure private operations, but that is the decision of that Board. As indicated earlier, they could even terminate the existence of the Public Building Authority once its obligations were satisfied and there were no outstanding debts on the property and if that occurred, the properties that it owned would revert to the ownership of the entities that created it, which would be the City of Manchester and Coffee County. So the one in control of what happens at the Conference Center at this time is the Public Building Authority Board. Another option is that the City and the County if they could each come up with the money, they could pay off the bonds and then they would be free to be released from the transaction. Clearly that would be the case if both did it; as previously stated, there is uncertainty if only one of them did it.

There is one other option that could be taken if any of the entities involved wanted to do so. There is a provision in the statutes of Tennessee whereby a party to a contract has questions of interpretation or uncertainty as to the meaning of the language that they can file what is known as a Declaratory Judgment suit to ask the Court to interpret the contract and advise the parties of their rights and obligations. Any party involved cannot appropriately just refuse to make the payments in my opinion because of the contract and because of the potential of incurring opposing parties legal expenses if you were unsuccessful, but they could file a Declaratory Judgment suit that just asks the Court to interpret the contract without taking a chance of being in breach of the contract by just stopping support. I think that is a potential alternative and if nothing else based on the fact that two (2) of the lawyers involved in advising the parties have differing opinions on what the obligations are, indicates it is a legitimate course to take if either of the entities wish to do so. I believe both entities would like to see the Conference Center continue to exist and to thrive and to be a plus for the community. It has been a benefit to the community, but it has been a costly benefit and it needs to become self-supporting. The frustration of most concerned is that by now it should be and it hasn't, so what is the best course to take next?

On behalf of Mayor Cordell as well as myself the final comment I want to make is that both the City and the County have been struggling with this situation for years and that is not a situation of their making. Both this and the prior administration inherited it. There are good people with a lot of talent giving their time and service on that Board. We know that having the Conference Center is a plus to the community, but at the same time, we realize that if it's to be a real plus to the community it must be self-sustaining; it cannot continually be a drain on the City's and the County's budget. But before we take any other action and since it is ultimately the PBA Board that is in charge of the Center and its operation, on behalf of the County, I would request of that Board as the first step in the process, that Board – the PBA, to come up with a plan by which

the Conference Center will become self-sustaining, in regard to its operation expenses, and submit that to the City and County entity officials. The entities worked together to create the Conference Center we need to now work together to get its financial situation solved.

Thank you,

*s / Bob Huskey
County Attorney*