

OFFICE OF THE CITY ATTORNEY
500 West Markham, Ste. 310
Little Rock, Arkansas 72201

Thomas M. Carpenter
City Attorney

Telephone (501) 371-4527
Telefacsimile (501) 371-4675

Writer's Direct Dial: **371-6875**
Writer's email: **tcarpenter@littlerock.gov**

October 11, 2017

Mr. Russell R. Racop
BAD CITY OF LR BLOG
301 Alamo Drive
Little Rock, Arkansas 72211

Re: October 10, 2017 letter, stating Mayor Stodola is in violation of City Campaign Finance Code| Little Rock, Ark., Rev. Code § 2-389 (1988)

Dear Mr. Racop:

This letter is in response to the one you left at my office yesterday. Unfortunately, I was between meetings and did not have the chance to speak with you personally.

Your letter asserts concern about a “flagrant” violation of § 2-389 of the City Code of Ordinances by Mayor Mark Stodola. You provided an exhibit of a January 31, 2017, filing by Mayor Stodola with the Pulaski Circuit Clerk which noted carryover funds of \$78,411.94 from his 2016 election. The Code provision states that any monies left over from a campaign after expenses must be paid into the City general fund, provided to a nonprofit tax exempt organization, returned to campaign contributors, or some combination of these possibilities.

While it at first blush appears that there is a violation of the City ordinance, the problem is that the City ordinance has been preempted by amendments to the state campaign finance laws. In a memorandum I prepared in 2010, I noted that because the State of Arkansas does not put such a limitation on what can be done with excess of carryover funds from a political campaign, and because the State did not grant local governments the authority to set more strict requirements as to such funds, then the state statute had preempted the City’s ordinance. I have attached a copy of that memorandum to this letter.

OFFICE OF THE CITY ATTORNEY

Letter to Mr. Russell R. Racop
Re: October 10, 2017 letter on Campaign Finance Code
October 11, 2017: Page 2 of 3

I spoke with Mayor Stodola about your complaint. He noted, among other things, that after his last election he contacted the various donors and asked if they would like the donation refunded. Everyone who sought repayment received it. So the amount currently in carryover funds represents those contributions to a previous campaign that were not spent and for which there was no request to return the money. In addition, the Mayor donated several thousand dollars to various non-profit organizations, and in one case to the City to help with the construction of a gate to a neighborhood.

Without turning this letter into a legal brief, when the State government decides to act in a particular area then a local ordinance contrary to such an enactment is preempted. In this instance, the State has created an entire field of law for campaign finance (that among other things came about through an initiated act). There is only one provision in the entire subchapter of the Arkansas Code that provides local governments with any authority. It reads:

Municipalities, counties, and townships shall have the authority to establish reasonable limitations on:

- (1) Time periods that candidates for local office shall be allowed to solicit contributions;
- (2) Limits on contributions to local candidates at amounts lower than those set by state law; and
- (3) Voluntary campaign expenditure limits for candidates seeking election to their respective governing bodies.

Ark. Code Ann. § 7-6-224 (West 2014). The first issue is the subject of a recent City request for an advisory opinion from the Arkansas Ethics Commission. The aspect of the statute that allows local governments to set lower limits on contributions to local candidates has not been tested, but a federal court in striking down a state limitation noted any such ordinance would be subject to the same constitutional frailties as a similar state law provision. *Russell v. Burriss*, 146 F.3d 563, *cert. denied*, 525 U.S. 1145 (1997).

An ordinance that is in direct conflict with the provisions of a state statute is void and cannot be enforced. *Municipality of Helena-West Helena v. Weaver*, 374 Ark. 109, 114, 286 S.W.2d 132, 136 (2008). This is the situation here. A municipal ordinance that limits what a candidate can do

OFFICE OF THE CITY ATTORNEY

Letter to Mr. Russell R. Racop

Re: October 10, 2017 letter on Campaign Finance Code

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with any excess or carryover funds which is in conflict with the state statutory provisions suffers a conflict and is preempted.

Hence, as to your specific complaint, § 2-389 is void and unenforceable in terms of what a candidate for City office can do with any monies left over at the end of a campaign for that office. As a result, Mayor Stodola is not in violation of City ordinance. To be sure, any member of the Board of Directors who may have a carryover balance from their last political campaign would also not be in violation of the ordinance.

Sincerely,



Thomas M. Carpenter

City Attorney

TMC:ct

cc. Mayor Stodola and Members of the Board of Directors

Bruce T. Moore, City Manager

James E. Jones, Assistant City Manager

Susan Langley, City Clerk

William C. Mann, III, Chief Deputy City Attorney

Debbie Wisdom, Law Office Coordinator

att. 1) October 10, 2017 letter from Mr. Russ Racop

2) December 7, 2010 memorandum from Thomas M. Carpenter to Board of Directors

Bad City of LR Blog

301 Alamo Drive · Little Rock, AR 72211
501-352-0043 · badlittlerock@gmail.com

October 10, 2017

Tom Carpenter, City Attorney
500 West Markham, Ste. 310
Little Rock, Arkansas 72201

Re: Stodola Complaint

Mr. Carpenter:

Mayor Mark Stodola is in flagrant violation of Little Rock City Code Sec 2-389 (See Exhibit 1), which states:

“Within thirty (30) days following a general election, if there is no campaign deficit, a candidate for municipal office shall turn over any balance of campaign funds over expenses incurred as of the day of election either to:

(a) The city for the benefit of the city general fund; or

(b) A nonprofit organization which is exempt from taxation under section 501(c)(3) of the United State Internal Revenue Code; or

(c) The contributors to the candidate's campaign; or

(d) A combination of the entities listed in this subsection.

Mayor Stodola has and continues to be in violation of that code in that he has maintained an interest-bearing checking account since and even possibly before the last election, that contains funds carried over from a previous campaign for the office of Little Rock Mayor. See Exhibit 2.

I request that your office investigate this matter and prosecute Mayor Stodola to the fullest extent of the law.

This matter is of great public interest in that you, the Mayor and the entire Board of Director's have attempted to enforce a portion of Article X. – Elections, specifically Sec. 2-387 while ignoring the Mayor's inexcusable refusal to follow another section of that code himself.

Sincerely,

A handwritten signature in black ink that reads "Russell R. Racop". The signature is written in a cursive style with a large, stylized 'R' at the beginning.

Russell R. Racop
Publisher and Editor – Bad City of Little Rock Blog
<http://badlittlerock.blogspot.com>

THE LITTLE ROCK CITY CODE, - REVISED 1988

GENERAL ORDINANCES OF THE CITY

Published in 1988 by Order of the City Commission

Adopted, September 28, 1988

Effective, September 28, 1988

municode

Municipal Code Corporation | P.O. Box 2235 Tallahassee, FL 32316
info@municode.com | 800.262.2633
www.municode.com

Sec. 2-389. - Balance of funds over expenses.

Within thirty (30) days following a general election, if there is no campaign deficit, a candidate for municipal office shall turn over any balance of campaign funds over expenses incurred as of the day of election either to:

- (a) The city for the benefit of the city general fund; or
- (b) A nonprofit organization which is exempt from taxation under section 501(c)(3) of the United State Internal Revenue Code; or
- (c) The contributors to the candidate's campaign; or
- (d) A combination of the entities listed in this subsection.

(Ord. No. 17,408, § 5, 2-18-97)



CARRYOVER FUND REPORTING FORM

Year of Election: 2014

NOTE: The carryover fund reports of a person who ran for school district, township, municipal, or county office are required to be filed with the **county clerk** of the county in which the election was held. The carryover fund reports of a person who ran for state or district office are required to be filed with:

Mark Martin, Secretary of State
 State Capitol, Room 026
 Little Rock, AR 72201
 Phone (501) 682-5070
 Fax (501) 682-3408

For assistance in completing this form contact:
 Arkansas Ethics Commission
 Post Office Box 1917
 Little Rock, AR 72203-1917
 Phone (501) 324-9600
 Toll Free (800) 422-7773

Check if this report is an amendment

Officeholder/Candidate Information	(file stamp)
1. Name of Officeholder/Candidate <u>MARK STODOL</u>	FILE/31 01/31/17 15:39:46 Larry Crane Pulaski Circuit Clerk
Address <u>5200 N. EXAMINERS ST</u>	
City, State, and Zip <u>Little Rock, AR 72207</u>	
Office <u>MAYOR</u>	
2. Type of Report: (check only one) This report covers what period? (<u>01/01/16</u>) through (<u>02/31/16</u>)	
<input type="checkbox"/> First Quarter (due April 15) <input type="checkbox"/> Fourth Quarter (due January 15) <input type="checkbox"/> Second Quarter (due July 15) <input checked="" type="checkbox"/> Annual Report for Calendar Year <u>2016</u> (due January 31) <input type="checkbox"/> Third Quarter (due October 15) <input type="checkbox"/> Closing Out of Carryover Account	
A quarterly report is due if you have expended in excess of \$500 since your last report concerning carryover funds. No report is required in any calendar quarter in which you have not exceeded the cumulative expenditure limit of \$500 since your last report. An annual report is not required if you have filed at least one quarterly report during the calendar year. A person is required to file a report for the calendar quarter in which he or she transfers carryover funds to his or her active campaign fund.	

SUMMARY	FOR REPORTING PERIOD	YEAR-TO-DATE
3. Balance of carryover funds at beginning of reporting period	<u>\$ 78,177.51</u>	
4. Interest (if any) earned on carryover account	<u>234.43</u>	
5. Total expenditures (enter amount from line 10)	<u>—</u>	
6. Balance of carryover funds at close of reporting period	<u>* 78,411.94</u>	

I certify that I have examined this Report, and that to the best of my knowledge and belief it is true, correct, and complete.

Mark Stodol
 Signature of Officeholder/Candidate

Sworn to and subscribed before me, a Notary Public, in and for Pulaski County, Arkansas, on this 31st day of January, 20 17.

Stacia Chastain
 Signature of Notary

My Commission Expires: 09-03-2021

Note: If faxed, notary seal must be legible (i.e., either stamped or inked) and the original must follow within ten (10) days.

Ark. Code Ann. § 7-6-202 provides that a person who knowingly fails to comply with the provisions of subchapter 2 of chapter 6, Title 7 of this Code shall be guilty of a Class A misdemeanor.





OFFICE OF THE CITY ATTORNEY

Little Rock, Arkansas

M E M O R A N D U M

TO: Mayor Stodola & Members of the Board of Directors

**FROM: Thomas M. Carpenter
City Attorney**

**Re: DISPOSITION OF SURPLUS CAMPAIGN FUNDS/
LITTLE ROCK, ARK., REV. CODE § 2-389 (1988)**

DATE: 07 December 2010 (extended version)

This memorandum addresses a number of issues that I realized needed to be addressed while I researched a question for Director Keck as to what avenues were available to the City if a candidate failed to comply with the provisions of the City code on surplus campaign funds.¹ The basic question to be addressed is whether the City's campaign finance ordinance as to the disposition of contributions is inconsistent with state law. It is.

The specific provision reads:

Within thirty (30) days following a general election, if there is no campaign deficit, a candidate for municipal office shall turn over any balance of campaign funds over expenses incurred as of the day of the election either to:

(a) The city for the benefit of the city general fund; or

¹ The specific question appeared to deal with what enforcement action the City could take any for violation of § 2-389. A former candidate for an at-large position on the City Board of Directors evidently held campaign contributions in excess of expenditures for at least two (2) years. The funds were available when the candidate announced a desire for a County Quorum Court position, but the candidate later decided to run for another position on the Board of Directors. The campaign finance ordinance has no specific penalty provision, so at best it was an ordinance violation subject to a one year statute of limitations which had long passed. In reviewing this specific issue, the research led to the information that is set forth in this memorandum.

Memorandum to Mayor Stodola & Members of the Board of Directors
Re: Disposition of Surplus Campaign Funds/Little Rock, Ark., Rev. Code § 2-389 (1988)
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- (b) A nonprofit organization which is exempt from taxation under section 501(c)(3) of the United States Internal Revenue Code; or
- (c) The contributors to the candidate's campaign; or
- (d) A combination of entities listed in the subsection.

Little Rock, Ark., Rev. Code § 2-389 (1988)². This provision is taken from Little Rock, Ark., Ordinance No. 17,408 (February 18, 1997) which was enacted, in part, in response to a statewide initiated Act which provided local governments with some authority to be more strict than state campaign finance laws.

It is true that a municipality may impose more strict conditions than state law provides as to campaign finance provisions. Ark. Code Ann. § 7-6-224 (West 2004). However, this authority is quite unlimited.

Municipalities, counties, and townships shall have the authority to establish reasonable limitations on:

- (1) Time periods that candidates for local office shall be allowed to solicit contributions;
- (2) Limits on contributions to local candidates at amounts lower than those set by state law; and
- (3) Voluntary campaign expenditure limits for candidates seeking election to their respective governing bodies.

² Hereafter the City Code will be cited as "LRC § ___" when a reference to the section is insufficient.

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These are the only three areas in which state law permits a local government to be more restrictive than state law. Otherwise, state government has totally set out the laws on campaign finance, or has occupied the field of state law. Again, the question presented in this memorandum is whether the City's ordinances on campaign finance conflict with state law. If so, then state law controls and the City's ordinances cannot be enforced.

The fundamental question presented here is whether the City's ordinance is preempted by state law. Preemption occurs when a local ordinance is contrary to a state statute in an area where the State has "occupied the field," of regulation. In other words, when the State has developed an entire methodology to deal with a subject, then a local ordinance that contravenes state statute is invalid and cannot legally be enforced.

In this case, the State of Arkansas has created an entire statutory scheme to deal with the issue of campaign finance on the state, county, and local level. The City's provision for the disposition of funds left over after an election, and the election bills are paid – LRC § 2-389 – contravenes the state statutes that deal with the monies a candidate may maintain as carryover funds. Because there is a direct conflict, the ordinance cannot be enforced.

It is true that state statutes grant local governments some authority over certain areas of campaign finance. Ark. Code Ann. § 7-6-224 (West 2004). Yet, these limitations do not include the ability to exclude a definition of excess funds contrary to the provisions of state law, i.e., to declare funds surplus until, at least, before carryover funds have been deducted. In fact, in another context the U.S. Court of Appeals for the 8th Circuit commented that § 7-6-224 is "simply an allocation by the state of Arkansas of certain of its plenary powers...." *Russell v. Burris*, 146 F.3d 563, 572 (1998). In other words, § 7-6-224 specifically states the few areas of control a local government may exercise over campaign finance provisions. The *Russell* case was a direct chal-

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lence on several provisions of Initiated Act 1, a statewide campaign practices and finance act approved by the electors during the November, 1996, general election.³

One significant factor in this discussion of state preemption is that LRC § 2-389 was passed based upon the powers granted to local governments by Initiated Act No. 1.⁴ In other words, to determine the scope of local government authority over the state act, it is necessary to review the limitations contained in §7-6-224. As pointed out above, this limited authority does not include the ability to define excess funds – i.e., surplus funds – in a manner that does not include carryover funds.

The City ordinance, § 2-389, is in conflict with state law in a number of ways. First, the ordinance sets a more stringent time frame than state statute. Next, the ordinance defines excess funds more restrictively than state law. Finally, the ordinance fails to contain any provision for “carryover funds,” as that term is defined in state law.

Time frame

³ It must be pointed out that the *Russell* decision was focused upon other aspects of the Act. The language quoted in this memorandum was used to explain why the plaintiffs did not have a genuine basis to decide a challenge to Ark. Code Ann. § 7-6-224 (West 2004) – i.e., did not have standing to raise the claim. The language is quoted, however, because it is instructive of the court’s understanding that § 7-6-224 is a limited grant of power from the state to local governments on discrete issues of campaign finance.

⁴ The first two recitals of the ordinance state:

WHEREAS, the voters have approved Initiated Act No. 1 which sets certain limits on political campaign financing; and

WHEREAS, *the Act grants local governments the authority to adopt restrictions on campaign finance that are more strict than state law*

The City's ordinance requires that "[w]ithin thirty (30) days following a general election, if there is no campaign deficit, a candidate for municipal office shall turn over any balance of campaign funds over expenses...." § 2-389. State law, on the other hand, does not ultimately require a filing until thirty (30) days after the final report is filed, which means that a supplement to the final report can be filed which lists other expenditures and contributions. Ark. Code Ann. § 7-6-208 (a) (4) (West Supp. 2010).

It should be noted, however, that the City's ordinance is ambiguous. It requires the actions be taken with any excess funds thirty (30) days after the election *if there is no campaign deficit...*" LRC § 2-389 (emphasis added). The immediate question is what happens if there is a campaign deficit at that time? The City's ordinance is not necessarily preempted by state law since Ark. Code Ann. § 7-6-208 (a) (4) sets a maximum time frame for compliance with the statute; in other words, the maximum time frame of the state statute provides an answer for the apparent ambiguity of the time frame for the City ordinance.

City definition of excess funds

The City requires disposition of "any balance of campaign funds over expenses...." LRC § 2-389. There is no definition of these funds as surplus funds or excess funds, merely that it is the balance of a campaign account after expenses have been paid. However, this parameter is in conflict with state law. Under the state statute

"Surplus campaign funds" means any balance of campaign funds over expenses incurred as of the day of the election except for:

(A) *Carryover funds*; and

(B) Any funds required to pay loans made by the candidate from his or her personal funds to the campaign or to repay loans made by financial institutions to the candidate and applied to the campaign.

Ark. Code Ann. § 7-6-201 (17) (West Supp. 2010) (emphasis added). The City ordinance has no provisions for the repayment of loans from the candidate, but more particularly, for the repayment of carryover funds.

The repayment of funds to the candidate, or loans taken to fund the campaign, has a particular significance. The individual contribution of the candidate, or the repayment of the candidate's loan, is effectively a personal payment – repayment – to the candidate from campaign contributions. It is not an “expense,” of the campaign. Therefore, the state definition permits a candidate to cancel campaign debt, for example, that the ordinance does not permit.

The second major failing of the ordinance is that it makes no provision for carryover funds. Yet, the state statute expressly excludes carryover funds from the definition of “surplus campaign funds.” This is another area in which state law preempts the local ordinance.

Carryover funds

“Carryover funds,” is a specifically defined term under state law:

“Carryover funds” means the amount of campaign funds retained from the last election by the candidate for future use but not to exceed the annual salary, excluding expense allowances, set by Arkansas law for the office sought.

Ark. Code Ann. § 7-6-201 3) (West Supp. 2010). State law establishes that the salary for a member of the Board of Directors is the amount established by the voters of the City. Ark. Code Ann. § 14-61-110 (West 2004). For a ward or at-large member of the Board, this amount is \$12,000.00

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per year. The amount for the position of Mayor is “salary and benefits comparable to the salary and benefits of the an official or employee of the municipality with similar executive duties and powers.” Ark. Code Ann. § 14-47-140 (a) (4) (West Supp. 2010). So, the Mayor’s salary⁵, and not the benefit package, is the amount defined as carryover funds by state law.

The City’s ordinance contains neither a definition of carryover funds, nor notes that carryover funds are first excluded from campaign funds before there is a requirement to dispose of any excess monies. Again, the City’s ordinance is preempted to the extent that it does not provide that a candidate may maintain carryover funds. The reason is that the exclusion of carryover funds is not one of the three areas the statute permits a local government to act more restrictively than the state. *See* Ark. Code Ann. § 7-6-224.

CONCLUSION

Provisions of the City’s campaign finance ordinances are preempted by state law. These preemptions include: (1) the ability of a candidate to file a supplemental report thirty (30) days after the “final report” to note additional contributions and expenditures; (2) the right of the candidate to exclude carryover funds and funds loaned by the candidate, or by a financial institution, for the use of the campaign; and, (3) a definition of carryover funds to include the salary for one year that goes with the Board position, including Mayor, that is sought. To that end, because there is a state law preemption, the City cannot enforce its ordinance on the disposition of campaign funds. LRC §2-839 (1988).

TMC:ct

⁵ The salary alone for the Mayor is currently \$160,000 per year.

OFFICE OF THE CITY ATTORNEY

Memorandum to Mayor Stodola & Members of the Board of Directors
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