

Memorandum

Government of the District of Columbia

TO: Ellen M. O'Connor
Chief Financial Officer

Office: Corporation Counsel
Prepared by: LCD:KLC:TFB:lf:pw
(AL-94-462)

FROM: Vanessa Ruiz
Corporation Counsel

Date: October 28, 1994

Opinion of the Corporation Counsel

RE: May the District pay preconstruction costs for a new convention center and a new sports arena from the FY 1995 Appropriations Act?

This is in reply to your request for my legal opinion as to whether or not the District may pay for studies of the feasibility of constructing a new convention center and a new sports arena from FY 1995 appropriations under the headings "Washington Convention Center Fund," "Starplex Fund," and "Rainy Day Fund." The short answer is yes. My opinion is based on an analysis of the FY 1995 Appropriations Act, the statutes establishing the funds in question, more recent statutes establishing successor funds, and the principles of appropriations law.

Fiscal Year 1995 Appropriations Act

The District of Columbia Appropriations Act, 1995, Pub. L. No. 103-334, approved September 30, 1994, appropriates \$12,850,000 for the Washington Convention Center Fund, and for the Starplex Fund "an amount necessary for the expenses incurred by the Armory Board in the exercise of its power granted by An Act to establish a District of Columbia Armory Board ... and the District of Columbia Stadium Act of 1957" The Appropriations Act also establishes a "Rainy Day Fund" of \$22,508,000 for "mandatory unavoidable expenditures within one or several of the various appropriation headings of this Act to be allocated to the budgets for personal services and nonpersonal services as requested by the Mayor and approved by the Council. . . ."

Washington Convention Center Fund

The Washington Convention Center Management Act of 1979, D.C. Law 3-36, effective November 3, 1979, D.C. Code § 9-601 et seq. (1989), established a Washington Convention Center Board with the duty to "develop policies for the management, maintenance and operation of the convention center" and the authority to "enter into contracts to achieve its purposes."

Section 4, D.C. Code § 9-603. Section 6 of the act, D.C. Code § 9-605, established the Washington Convention Center Fund, into which the Board was to deposit all revenues and from which it was to pay "all expenses necessary for the operation and management of the convention center."

The Washington Convention Center Authority Act of 1994, D.C. Law 10-188, effective September 28, 1994, D.C. Code § 9-701 et seq. (1995 Supp.), abolishes the Washington Convention Center Fund and transfers its assets and liabilities to a new Washington Convention Center Authority Fund into which dedicated revenues are to be deposited and from which are to be paid the expenses incurred by the new Board of the Washington Convention Center Authority. Section 208, D.C. Code § 9-709 (1995 Supp.). Until the new Board is in place, its duties are to be discharged on an interim basis by the old Convention Center Board. Section 217(b), D.C. Code § 9-718.

The Board of the Washington Convention Center Authority is authorized to construct and operate a new Convention Center. Section 202(b), D.C. Code § 9-703. The expenses which the Board is authorized to pay from the Authority Fund are "all expenses necessary for debt service, reserve funds, repair, maintenance, issuance costs, and preconstruction costs, other expenses necessary or incident to determining the feasibility of constructing the New Convention Center and all other costs of operating and managing the Authority." Section 208(c), D.C. Code § 9-709(c). The Board is directed specifically to reimburse "any and all reasonable, necessary, and verified preconstruction costs that are borne by the District government." Section 204(f), D.C. Code § 9-705(f).

Starplex Fund

Section 1 of an Act to establish a District of Columbia Armory Board, 62 Stat. 339, ch. 418 (1948), D.C. Code § 2-301 (1994), directed the Armory Board to operate and maintain the Armory in order to provide facilities for the D.C. National Guard "and, secondarily, to provide suitable facilities for major athletic events, conventions, concerts, and such other activities as may be in the interest of the District of Columbia." Section 8 of this Act, as amended, D.C. Code § 2-307, established the Starplex Fund, into which the Armory Board was to deposit its receipts and from which it is to pay "all expenses incurred by the Armory Board in the exercise of the powers granted" by the Act.

The Omnibus Sports Consolidation Act of 1994, D.C. Law 10-152, effective August 23, 1994, D.C. Code § 2-4001 et seq. (1995 Supp.), creates a new Sports Commission Fund, which is to receive dedicated revenues pursuant to the Arena Tax Amendment Act of 1994, D.C. Law 10-189, effective September 28, 1994. There are

to be transferred to the Sports Commission Fund "all monies other than funds designated for military purposes held by the Armory Board in the Starplex Fund"; the Fund is "to be used for any lawful purpose of the Sports Commission." Until the new Sports Commission is in place, its duties are to be discharged on an interim basis by the old Armory Board, under the Armory Board Interim Authority Amendment Emergency Act of 1994, D.C. Act 10-325, enacted October 14, 1994.

The Sports Commission is authorized to develop and construct new facilities and to collect and expend tax revenues dedicated to such facilities. Sections 7 and 8 of D.C. Law 10-152, D.C. Code §§ 2-4006 and 2-4007. Tax revenues deposited in the Sports Commission Fund not required to pay preconstruction costs and debt service are to be transferred to the General Fund. Section 601(d)(3) in Title VI ("Omnibus Sports Consolidation Act Amendments") of the Washington Convention Center Authority Act, D.C. Law 10-188, D.C. Code § 2-4012(c).

Legal Analysis

To summarize the foregoing: the FY 1995 Appropriations Act appropriates funds to the Washington Convention Center Fund and the Starplex Fund and authorizes allocations from the Rainy Day Fund for necessary expenditures within those two appropriation headings. At the time these appropriations were requested, the Washington Convention Center Board was statutorily responsible for paying the expenses of operating and managing the existing Convention Center from the Washington Convention Center Fund; and it was the statutory duty of the Armory Board to pay the expenses of providing facilities for athletic events, concerts and other activities at the existing Armory from the Starplex Fund. Since the appropriations were requested, newly-enacted statutes have created successor Funds to these two Funds and have directed the respective Boards to do the necessary preconstruction work and to issue bonds to finance the construction of new successor facilities.

The guiding rules of law in this area are spelled out in Principles of Federal Appropriations Law, pp. 4-11 through 4-12, published by the Office of the General Counsel of the United States General Accounting Office:

A frequently recurring situation is where a statute is passed imposing new duties on an agency but not providing any additional appropriations. The question is whether implementation of the new statute must wait until additional funds are appropriated, or whether the agency can use its existing appropriations to carry out the new function, either pending receipt of further funding through the normal budget process or

in the absence of additional appropriations (assuming in either case the absence of contrary congressional intent). The rule is that existing agency appropriations which generally cover the type of expenditures involved are available to defray the expenses of new or additional duties imposed by proper legal authority. The test of availability is whether the duties imposed by the new law bear a sufficient relationship to the purposes for which the previously-enacted appropriation was made so as to justify the use of that appropriation for the new duties.

For example, in the earliest published decision cited for the rule, the Comptroller General held that the Securities and Exchange Commission could use its general operating appropriation for fiscal year 1936 to perform additional duties imposed on it by the later-enacted Public Utility Holding Company Act of 1935. 15 Comp. Gen. 167 (1935).

Similarly, the Interior Department could use its 1979 "Departmental Management" appropriation to begin performing duties imposed by the Public Utilities Regulatory Policies Act of 1978, and to provide reimbursable support costs for the Endangered Species Committee and Review Board created by the Endangered Species Act Amendments of 1978. Both statutes were enacted after Interior's 1979 appropriation. B-195007, July 15, 1980.

A related question is the extent to which an agency may use current appropriations for preliminary administrative expenses in preparation for implementing a new law, prior to the receipt of substantive appropriations for the new program. Again, the appropriation is available provided it is sufficiently broad to embrace expenditures of the type contemplated. Thus, the National Science Foundation could use its fiscal year 1967 appropriations for preliminary expenses of implementing the National Sea Grant College and Program Act of 1966, enacted after the appropriation, since the purposes of the new act were basically similar to the purposes of the appropriation. 46 Comp. Gen. 604 (1967). The preliminary tasks in that case included such things as development of policies and plans, issuance of internal instructions, and the establishment of organizational units to administer the new program.

The present positions of the Washington Convention Center Board and the Armory Board are much like that of the Department of the Interior Bureau of Land Management, considered by the Comptroller General in an unpublished decision, B-211306, dated June 6, 1983. There a statute designated certain lands as a wilderness area, and directed the Bureau determine the fair market value of any privately owned mineral rights to the land and to acquire such rights. However, as of the time of the Comptroller General's decision, no funds were appropriated to create the wilderness area. The Comptroller General decided that the Bureau could expend existing appropriations for preliminary expenses -- namely, to determine fair market value and to conduct negotiations -- while awaiting the availability of an appropriation to acquire the mineral rights. The Comptroller General ruled that such preliminary expenses were sufficiently "closely related to the Bureau's existing responsibilities to manage land and resources" to justify paying the preliminary expenses from the Bureau's existing appropriation.

Opinion

After the House of Representatives passed the District of Columbia Appropriations Act, 1995, the ranking majority and minority members of the relevant House authorization and appropriation committees wrote to the Mayor and Chairman Clarke about the new convention center and the new arena, in a letter dated September 26, 1994: "We believe it is reasonable and consistent with existing law for the District to begin the necessary pre-development work on both projects using resources appropriated for fiscal year 1995." I am of the same legal opinion.

In light of the Comptroller General decisions discussed supra, it is my opinion that the Washington Convention Center Board and the Armory Board may expend funds appropriated in the FY 1995 Appropriations Act under the headings "Washington Convention Center Fund" and "Starplex Fund" to perform studies of the feasibility of building successor facilities to the facilities they presently operate. Such feasibility studies bear a sufficient relationship to the purpose of these Boards' FY 1995 appropriations (i.e., to operate and maintain the existing facilities) as to justify the use of those appropriations to discharge the Boards' additional statutory duties.

It is my further opinion that the Mayor and the Council may allocate funds from the Rainy Day Fund appropriations to the Washington Convention Center Fund and the Starplex Fund, if the

Mayor and the Council determine¹ that preconstruction costs incurred by the Convention Center Board and the Armory Board in discharging their interim statutory responsibilities to construct new facilities are "mandatory unavoidable expenditures." The Mayor and the Council may also condition such an allocation on an agreement by the two Boards to reimburse the Rainy Day Fund as dedicated revenues are received. As noted supra, each Board has the authority to expend such dedicated revenues to cover preconstruction costs.² To the extent that each allocation is repaid during Fiscal Year 1995, and the expenditures are recorded against the Washington Convention Center Fund or the Starplex Fund, or their successors, I am of the opinion that such an allocation would not constitute the obligation of any General Fund appropriation. Rather, in each case, there would be no net expenditure by the General Fund -- only two self-cancelling transactions. The foregoing opinions form the legal basis for the accounting steps described by the Mayor in her letter to Chairman Clarke, dated October 24, 1994:

As to the question of budget authority, expenditures for the arena and convention center pre-development costs will initially be counted against the Rainy Day Fund appropriation. However, the Rainy Day Fund appropriation authority can be restored fully, when the Congress approves the use of the dedicated tax revenues for the arena and convention center "without appropriation" or enacts specific appropriations for those purposes. The District could then adjust its books to record the obligations and expenditures initially made to the Rainy Day Fund directly against the Arena and Convention Center Funds. This action would restore the Rainy Day Fund budget authority, leaving it without any obligations or expenditures recorded against it.

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¹ See Council Committee of the Whole Report, on Bill 10-557, the "Fiscal Year 1995 Budget Request Act," dated March 22, 1994: "For rare instances of extraordinary and unanticipated need, the Committee has established a \$22,508[,000] rainy-day fund to be accessed by the Mayor only with approval of the Council [by] resolution" (emphasis added).

² The Convention Center Board even has the statutory duty to reimburse the Rainy Day Fund for bearing preconstruction costs. See p.2 supra. However, this statutory duty is surplusage where either the Convention Center Board or the Armory Board assumes a contractual duty to reimburse the Rainy Day Fund.