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# OFFICE OF THE ATTORNEY GENERAL



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STATE OF ALABAMA

APR 10 1995

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Honorable Robert W. Ennis, IV  
City Attorney  
P.O. Box 2089  
Tuscaloosa, AL 35403-2089

Municipalities - Right-of-way  
- Private Purposes -  
Franchises

The city may allow a private business to place rest benches on the public right-of-way if they are not permanent structures and they do not create a public nuisance by interfering with traffic along the right-of-way. The city may not grant an exclusive franchise to the private business, but may avoid such by competitively bidding the contract. The fact that a private, nonprofit, charitable organization will receive part of the proceeds has no relevance.

Dear Mr. Ennis:

This opinion is issued in response to your request for an opinion from the Attorney General.

### QUESTIONS

1. Does a municipality have the authority to enter into an agreement whereby a private firm places quasi-permanent or not-readily portable structures in the

form of rest benches on public right-of-way and sells advertising space thereon for profit?

2. If a municipality does have such authority, would it be considered a franchise and thereby subject to the non-exclusive provisions of Section 22 of the Constitution?

3. Is it relevant to the inquiry of No. 1 and No. 2 that a nonprofit, charitable organization will receive any of the proceeds from the venture?

#### FACTS AND ANALYSIS

Your request states: A proposal has been made to the City of Tuscaloosa by a private firm and the Tuscaloosa Police Athletic League, Inc., that the City enter into a licensing agreement with the Police Athletic League whereby the League, through the private firm, will place benches at various points on public rights-of-way in the City, and then the League or the private firm would lease space on the benches to advertisers. The private firm would remit a part of the profits to the Police Athletic League. It is proposed that the entity, whether the League or the private firm, would have the exclusive and sole right and privilege to place such benches upon the public rights-of-way and streets.

Section 220 of the Constitution of Alabama 1901, provides:

"No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village."

This provision is codified in Code of Alabama 1975, § 11-49-1, as follows:

"No person, firm, association or corporation shall be authorized to use the streets, avenues, alleys and other public places of cities or towns for the construction or operation of any public utility or private enterprise without first obtaining the consent of the proper authorities of said city or town."

The Alabama Supreme Court held that Section 220 gives a municipality the authority to issue permits allowing street vending, provided that the vending does not constitute a public nuisance. Operation New Birmingham v. Flynn, 621 So.2d 1316 (Ala. 1993). The Court further stated that the regulations adopted by the municipality provide that vending carts do not constitute a permanent structure, nor do the regulations allow the carts to hinder public traffic along the sidewalks.

Pursuant to the authority cited above, the city may allow a private business to place rest benches on the public right-of-way if they are not permanent structures and they do not create a public nuisance by interfering with traffic along the right-of-way.

With respect to the second question, Section 22 of the Constitution of Alabama, 1901, provides:

"That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment."  
(Emphasis added.)

Your request states that the Police Athletic League and the private firm want to have the exclusive right to place benches on the public right-of-way. This proposal would violate the constitutional prohibition against granting exclusive contracts. We note that the courts have held that if the city grants the contract to an entity pursuant to competitive bidding the city avoids the exclusive grant of a special privilege. Kennedy v. City of Prichard, 484 So.2d 432 (Ala. 1986).

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Although it may be a worthy cause, the fact that a private, nonprofit, charitable organization will receive part of the proceeds of the venture does not affect the answers with respect to your first two questions.

CONCLUSION

The city may allow a private business to place rest benches on the public right-of-way if they are not permanent structures and they do not create a public nuisance by interfering with traffic along the right-of-way. The city may not grant an exclusive franchise to the private business, but may avoid such by competitively bidding the contract. The fact that a private, nonprofit, charitable organization will receive part of the proceeds has no relevance.

I hope this sufficiently answers your questions. If our office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

JEFF SESSIONS  
Attorney General

By:



JAMES R. SOLOMON, JR.  
Chief, Opinions Division

JS/BFS

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