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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Lowell Barron
Member, Alabama State Senate
Post Office Box 65
Fyffe, Alabama 35971

Honorable Alan Baker
Member, House of Representatives
Post Office Box 975
Brewton, Alabama 36427

Municipalities – Commercial Development Authority – Land Sales Act – Exemptions – DeKalb County – Escambia County

The transfer of land by a commercial development authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, is subject to the competitive bid requirements of the Land Sales Act, except if transferred for the purpose of promoting the economic and industrial development of the county or municipality or for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or service facilities of any kind under section 94.01 of the Recompiled Constitution of Alabama, and in compliance with section 94.01(c) of the Constitution if transferred for less than fair market value.

Dear Sirs:

This opinion of the Attorney General is issued in response to your requests.

QUESTIONS

(1) Did the Land Sales Act repeal or limit the bid law exemption for commercial development authorities?

(2) Did Section 94.01 of the Recompiled Constitution of Alabama (Amendment 772) limit the Land Sales Act regarding the transfer of land made pursuant to the provisions of that section?

(3) If so, is the transfer of land by an authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, subject to the competitive bid requirements of the Land Sales Act?

FACTS AND ANALYSIS

This Office has stated that the transfer of land acquired from the state from a municipality to a commercial development authority, and the subsequent transfer of the land by the authority, is exempt from the competitive bid requirements of the Land Sales Act. Opinion to Honorable Alan Baker, Member, House of Representatives, dated August 22, 2007, A.G. No. 2007-131.

The *Baker* opinion relied on section 11-54-186 of the Code of Alabama, which specifically exempts commercial development authorities from competitive bidding. ALA. CODE § 11-54-186 (2001). It states as follows:

> Any authority and all contracts made by it shall be ***exempt from the laws of the State of Alabama requiring competitive bids*** for any contract to be entered into by municipalities or public corporations authorized by them, ***including, but without limitation*** to, the provisions of Article 3 of Chapter 16 of Title 41.

Id. (emphasis added).

The Land Sales Act, codified at section 9-15-70, *et seq.*, of the Code of Alabama, generally requires competitive bidding for sales of state land. ALA. CODE § 9-15-70 to § 9-15-84 (2001). Section 9-15-82 states, in part, as follows:

> Provided that nothing herein contained shall be construed to apply in any manner to the ***sale or lease of any real property or interest therein owned by the State*** of Alabama and the departments, boards, bureaus, commissions, instrumentalities, corporations and agencies of the state ***to*** the United States government, any county or municipal board of education, ***any*** county or ***municipal governing body or any of their*** respective boards, agencies, departments, corporations or ***instrumentalities including corporations*** and/or boards ***in regard to which any*** county or ***municipal governing body is a determining or appointing authority, subject to the condition that such property or any interest therein is not resold, leased or otherwise transferred in whole or in part to any private person, firm or corporation without compliance with the provisions of this article.***

ALA. CODE § 9-15-82 (2001) (emphasis added).

Section 9-15-82 of the Code states that these transfers between certain governmental entities are exempt on the condition that if the property or interest is resold, leased, or transferred to any private person, firm, or corporation, it must be done in compliance with the Land Sales Act. You question whether applicability of this condition is limited to the first transfer after the exempt transfer or if the condition runs with any subsequent transfer between governmental entities so that the first transfer from one of the entities to a private entity triggers the act. The obvious purpose of this provision is to require competitive bidding when property originally acquired from the state passes out of the hands of the governmental entities listed above for the first time. Therefore, if land is transferred from the state to a governmental entity covered by the statute, and the land is then transferred to another covered governmental entity, which entity then transfers it to a private entity, the transfer to the private entity would be subject to bidding under the Land Sales Act, unless otherwise provided by some other statutory or constitutional provision.

To determine whether a commercial development authority ("authority") is covered by section 9-15-82, the manner in which an authority is created must be examined. The authority is incorporated as a public corporation pursuant to section 11-54-170, *et seq.*, of the Code of Alabama. ALA. CODE § 11-54-170 to § 11-54-192 (1994). The authority's board of directors is appointed by its authorizing municipality. ALA. CODE § 11-54-176 (1994). Thus, by the plain terms of section 9-15-82, the authority is an instrumentality of the municipality and is subject to the bid requirements of the Land Sales Act, unless otherwise provided by some other statutory or constitutional provision.

Section 94.01 of article IV of the Recompiled Constitution of Alabama (Amendment 772) provides for the promotion of economic and industrial development by counties and municipalities. It states, in part, as follows:

> (a) The governing body of any county, and the ***governing body of any municipality*** located therein, for which a local constitutional amendment has not been adopted authorizing any of the following, shall have full and continuing ***power to*** do any of the following:
>
> . . .
>
> (2) Lease, sell, grant, exchange, or otherwise convey, ***on terms approved by the governing body of the county or the municipality,*** as applicable, all or any part of any ***real property,*** buildings, plants, factories, facilities, machinery, and equipment of any kind or industrial park project to any ***individual, firm, corporation, or other business entity, public or private,*** including any industrial development board or other public corporation or authority heretofore or hereafter created by the county or the municipality, for the purpose of ***constructing, developing, equipping, and operating industrial, commercial, research, or service facilities of any kind.***

ALA. CONST. art. IV, § 94.01 (amend. 772) (emphasis added).

Section 94.01(a)(3) further authorizes the county or municipality to lend its credit to or grant public funds and things of value in aid of or to any individual, firm, corporation, or other business entity, public or private, for the purpose of promoting the economic and industrial development of the county. ALA. CONST. art. IV, § 94.01(a)(3) (amend. 772). The only limitations on the powers above are found in section 94.01(c), which mandates that the county or municipality cannot lend its credit or grant public funds or thing of value unless prior thereto both of the following are satisfied:

> (1) The action proposed to be taken by the county or municipality is approved at a public meeting of the governing body of the county or municipality, as the case may be, by a resolution containing a determination by the governing body

> that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose, notwithstanding any incidental benefit accruing to any private entity or entities.
>
> (2) At least seven days prior to the public meeting, a notice is published in the newspaper having the largest circulation in the county or municipality, as the case may be, describing in reasonable detail the action proposed to be taken, a description of the public benefits sought to be achieved by the action, and identifying each individual, firm, corporation, or other business entity to whom or for whose benefit the county or the municipality proposes to lend its credit or grant public funds or thing of value.
>
> For purposes of the foregoing, any sale, lease or other disposition of property for a price equal to the fair market value thereof shall not constitute the lending of credit or a grant of public funds or thing of value in aid of a private entity.

ALA. CONST. art. IV, § 94.01(c) (amend. 772). Subsection (c) provides that the county or municipality must comply with section 94.01(c) unless the "sale, lease or other disposition of property" is for a price equal to fair market value. *Id.*

This Office has addressed section 94.01 regarding the development of a race car drag strip, concluding that a county commission could lease real property for less than fair market value to promote economic and industrial development if the county satisfied the conditions of section 94.01(c). Opinion to Honorable Katy Smith Campbell, Attorney, Greene County Commission, dated August 5, 2005, A.G. No. 2005-171.

Section 9-15-82 of the Land Sales Act directly conflicts with the bid law exemption for commercial development authorities in section 11-54-186. Likewise, the authority of a county or municipality to convey property without restriction under section 94.01(a)(2) of the Constitution, in turn, directly conflicts with section 9-15-82 as well. Section 11-54-186 was enacted in 1980, while section 9-15-82, enacted in 1995, is the latest expression of the Legislature. House Bill 319 was enacted by the Legislature and became Act 2004-94. It was submitted to the voters on November 2, 2004, as a proposed constitutional amendment. It was proclaimed ratified on December 23, 2004, and became section 94.01 (amendment 772) of the Recompiled Constitution of Alabama, as amended.

The latest expression of the Legislature controls when there is a conflict between two provisions. *See State v. Franco Novelty Co. Inc.*, 293 Ala. 43, 299 So. 2d 737 (1974); *Ex parte CSX Transp., Inc.*, 533 So. 2d 613, 617 (Ala. Civ. App. 1987); and *Baldwin County v. Jenkins*, 494 So. 2d 584 (Ala. 1986). A constitutional amendment supersedes an earlier amendment on the same subject and is superior to the act of the Legislature based on the earlier amendment. Opinion to Honorable Gerald Willis, Representative, dated October 20, 1982, A.G. No. 83-00029. "Constitutional amendments take precedence over and supersede statutes." Opinion to Honorable John E. Amari, Member, Alabama State Senate, dated September 19, 1995, A.G. No. 95-00325 at 2.

Ordinarily, specific provisions relating to specific subjects control general provisions relating to general subjects. *Ex parte Jones Mfg. Co., Inc.*, 589 So. 2d 208, 211 (Ala. 1991); *Murphy v. City of Mobile,* 504 So. 2d 243, 244 (Ala. 1987); *Herring v. Griffin*, 211 Ala. 225, 226, 100 So. 202, 203 (1924). As this Office has recognized, however, "'[t]here is no rule which prohibits the repeal by implication of a special or specific act by a general or broad one.'" Opinion to Colonel Gene Mitchell, Director, Department of Public Safety, dated January 9, 1996, A.G. No. 96-00089 at 5, *quoting Conner v. State*, 275 Ala. 230, 153 So. 2d 787 (1963). Therefore, such a repeal occurs "when a comprehensive revision of a particular subject is promulgated." 1A Norman J. Singer, *Statutes and Statutory Construction* § 23.15 (6th ed. 2002). This Office has recognized that "general principals governing the construction of statutes equally apply to the construction of constitutions." Opinion to Honorable Chester Carroll, Mayor, Town of Camp Hill, dated February 24, 2006, A.G. No. 2006-060 at 4.

The Land Sales Act is the first bid law directed at all sales of state land. The act is thorough with detailed bidding requirements. The first statute of the act is a statement of the act's applicability. ALA. CODE § 9-15-70 (2001). It unequivocally states that it "applies to ***all real property and interests therein owned by the State*** of Alabama and the departments, boards, bureaus, commissions, institutions, corporations and agencies of the state ***with the exception of those sales, transfers, and reversions set out in Section 9-15-82***." *Id.* (emphasis added). In addition to the transfers between the governmental entities quoted above, section 9-15-82 exempts numerous other types of transfers and certain entities themselves from the operation of the act. Despite this exhaustive listing, the Legislature chose not to include an exemption for commercial development authorities. Where a statute enumerates certain things on which it is to operate, the statute must be construed to exclude all things not expressly mentioned. *Ex parte Holladay,* 466 So. 2d 956, 960-61 (Ala. 1985).

Section 94.01 of the Constitution was enacted as an exception to section 94 of article IV of the Recompiled Constitution of Alabama. Section 94 prohibits the Legislature from empowering a municipality, county, or other

subdivision of the state from granting public money or any other thing of value in aid of an individual, corporation, or association. ALA. CONST. art. IV, § 94.01(c) (amend. 558). Section 94.01(b), however, states that, in carrying out its purpose, the county or municipality shall not be subject to sections 93 or 94 of the Constitution. ALA. CONST. art. IV, § 94.01(b) (amend. 772). The Alabama Supreme Court has stated that section 94 is not violated when the funds of a governmental entity are appropriated for a public purpose. *Slawson v. Ala. Forestry Comm'n*, 631 So. 2d 953, 956 (1994).

This Office has consistently stated that the determination of whether a public purpose will be served by an expenditure of public funds is a factual one that can only be made by the governing body of the local government making the expenditure. Opinions to Honorable Barbara Walden, City Clerk/Treasurer, City of Boaz, dated September 27, 2004, A.G. No. 2004-223; Honorable James W. Richardson, Mayor, City of Carbon Hill, dated October 10, 2002, A.G. No. 2003-008; and to Honorable Robert S. Presto, Escambia County Attorney, dated August 24, 1995, A.G. No. 95-00299. Section 94.01 is a codification of *Slawson* and the opinions of this Office applying that case. It grants broad sweeping authority to counties and municipalities to act unhindered by traditional constitutional restrictions in the area of economic and industrial development.

Applying the rules of statutory construction, it is the opinion of this Office that the transfer of land by a commercial development authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, is subject to the competitive bid requirements of the Land Sales Act, except if transferred for the purpose of promoting the economic and industrial development of the county or the municipality or for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or service facilities of any kind under section 94.01 of the Recompiled Constitution of Alabama, and in compliance with section 94.01(c) of the Constitution if transferred for less than fair market value. The *Baker* opinion is modified to the extent that it is inconsistent with this opinion.

CONCLUSION

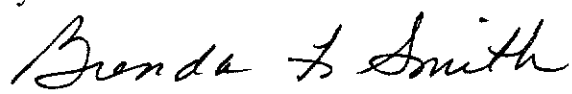
The transfer of land by a commercial development authority to a private person, firm, or corporation, originally acquired from the state and transferred to the authority through one or more transactions between governmental entities, is subject to the competitive bid requirements of the Land Sales Act, except if transferred for the purpose of promoting the economic and industrial development of the county or municipality or for the purpose of constructing, developing, equipping, and operating industrial, commercial, research, or

service facilities of any kind under section 94.01 of the Recompiled Constitution of Alabama, and in compliance with section 94.01(c) of the Constitution if transferred for less than fair market value.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
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