2009-086

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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June 29, 2009

Honorable J. Bradford Boyd Hicks
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Stone, Granade & Crosby, P.C.
Post Office Drawer 1509
Bay Minette, Alabama 36507

Municipalities – Economic Development – Public Works – Funds – Private Work – Public Purpose – Baldwin County

Under Section 94.01 of the Alabama Constitution, the Town of Magnolia Springs may borrow money and grant public funds to a private corporation or other private entity to aide the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the Town of Magnolia Springs, if the town determines a public purpose will be served. In like manner, Baldwin County Local Constitutional Amendments 3 and 4 also authorize the expenditure of funds by the Town of Magnolia Springs.

If public funds are transferred to a private entity, such funds are not subject to Alabama's laws regarding competitive bidding or public works bidding.

Dear Mr. Hicks:

This opinion of the Attorney General is issued in response to your request on behalf of the Town of Magnolia Springs.

QUESTIONS

(1) Under section 94.01 of the Alabama Constitution, may the Town of Magnolia Springs borrow money and grant public funds to a private corporation or other private entity to aide the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the Town of Magnolia Springs?

(2) If the answer to Question 1 is in the positive, would such expenditure of public funds be subject to Alabama's laws regarding competitive bidding or public works bidding?

(3) If the answer to Question 1 is in the negative, may the town contract directly for the construction of a portion of the center turn lane in the amount of $50,000 or less without being subject to Alabama's laws regarding competitive bidding or public works bidding?

FACTS AND ANALYSIS

In your letter of request, you informed this Office of the following:

> The Town of Magnolia Springs is a Class 8 municipality with a mayor-council form of government. A private corporation is exploring the possibility of constructing one of its stores on a parcel of property just outside the corporate limits of Magnolia Springs with the intention of petitioning for annexation into the town. The parcel of property abuts U.S. Highway 98. The Alabama Department of Transportation is requiring the corporation to widen Highway 98 and construct a center lane as a contingency to building their store on the parcel of property. The town's Comprehensive Plan also calls for, among other things, constructing a center turn lane on Highway 98. The estimated cost of

> constructing the turn lane is $150,000, and this additional expense will prevent the corporation from locating its store in Magnolia Springs. The town estimates it will collect $20,000 to $30,000 a year in sales tax revenue if the store is built in Magnolia Springs. The town would like to borrow money and grant an amount to the private corporation to aide it with constructing the center turn lane to ensure the store is located within the town. The town would have no responsibility in connection with constructing, planning, bidding, or engineering the center turn lane.

Your initial inquiry questions whether the Town of Magnolia Springs may borrow funds and then grant these public funds to a private entity to aide in the construction of a center turn lane, which would promote economic development within the town. Section 94.01(a)(3) (amendment 772) of the Recompiled Constitution of Alabama, as amended, authorizes a county commission or municipality to "[l]end 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 or municipality." ALA. CONST. art. IV, § 94.01 (amend. 772). Section 94.01 further states that, in carrying out its purpose, the county or municipality will not be subject to sections 93 or 94 of the Constitution. *Id.* A limitation on this specific grant of authority is found in subsection (c), which provides, in pertinent part, as follows:

> (c) Neither the county nor any municipality located therein shall lend its credit to or grant any public funds or thing of value to or in aid of any private entity under the authority of this amendment unless prior thereto both of the following are:
>
> > (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.

Id.; *see also*, opinions to Honorable Lowell Barron, Member, Alabama State Senate, dated October 22, 2008, A.G. No. 2009-009; Honorable Jimmy S. Calton, City Attorney, City of Eufaula, dated August 6, 2007, A.G. No. 2007-122; and to Honorable Katy Smith Campbell, Attorney, Greene County Commission, dated August 5, 2005, A.G. No. 2005-171.

Prior to the passage of section 94.01 of the Recompiled Constitution of Alabama, two constitutional amendments specific to Baldwin County were in effect that authorized action similar to that found in section 94.01. Specifically, Baldwin County Local Amendments 3 and 4 authorize actions and appropriations regarding economic development by the county or municipalities within that county. More particularly, Local Amendment 4 is almost identical to section 94.01 of the Recompiled Constitution. Both of these earlier local amendments state that the powers granted therein "may be exercised as [an] alternative to, or cumulative with, and in no way restrictive of, powers otherwise granted by law . . ." ALA. CONST. LOCAL AMENDS., BALDWIN COUNTY, §§ 3 and 4 (amends. 750 & 759). Thus, local amendments for Baldwin County also authorize the appropriation of funds to a private entity to develop economic or industrial development where a public purpose is served.

Next, you question whether the expenditure of public funds to a private entity would be subject to the Competitive Bid Law or the Public Works Law of the state. A similar question regarding the bid law and the appropriation of public funds was addressed in an opinion by this Office to Honorable Wynnton Melton, Mayor, City of Geneva, dated April 16, 2009, A.G. No. 2009-061. In that opinion, this Office stated that, once public funds are transferred to a private entity, such funds cease being public in nature, and are, therefore, not subject to the Competitive Bid Law of the state. *See, generally*, *Melton* at 6. This reasoning would also apply with regard to the Public Works Law of this state.

Although the funds may not be subject to the Competitive Bid Law or Public Works Law of the state, this Office has stated that it is better for a governmental entity to enter into a written agreement with an entity receiving funds rather than directly appropriating money. *Id.* at 6. Such an agreement could set out, among other things, the benefits that would be conferred upon the public in return for the appropriation. *See Melton* at 4.

Given the response to Question 1, Question 3 is moot.

CONCLUSION

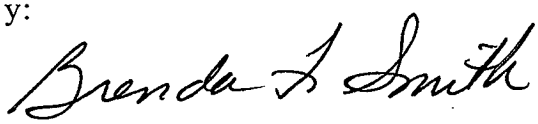
Under section 94.01 of the Alabama Constitution, the Town of Magnolia Springs may borrow money and grant public funds to a private corporation or other private entity to aide the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the Town of Magnolia Springs, if the town determines a public purpose will be served. In like manner, Baldwin County Local Constitutional Amendments 3 and 4 also authorize the expenditure of funds by the Town of Magnolia Springs.

If public funds are transferred to a private entity, such funds are not subject to Alabama's laws regarding competitive bidding or public works bidding.

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

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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