



# 2009-105

STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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Honorable W. Hardy McCollum  
Judge of Probate and Chairman  
Tuscaloosa County Commission  
Post Office Box 20067  
Tuscaloosa, Alabama 35402-0067

County Commissions – Sewers – Utilities –  
Private Property – Private Work – Public  
Purpose

If the Tuscaloosa County Commission determines the provision of sanitary sewer service to a select group of private residences would serve a “public purpose,” the county may contribute public funds to construct a sewer line without violating section 94 of the Constitution of Alabama.

A county governing authority should not enter private property to place lateral lines for the purpose of hooking individual residences up to a sewer system. In instances where such action is taken by the county, to prevent a violation of section 94 of the Constitution of Alabama, the county is required to assess all costs associated with such action to the private property owner.

The county does not have the authority to require individuals with a functioning septic system to tie on to the city’s sanitary sewer system unless the agreement between the county and the city requires the individuals to tie on to the municipal system.

It is the policy of this Office to refrain from deciding questions of constitutionality as this is the function of the courts.

Honorable W. Hardy McCollum  
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Dear Judge McCollum:

This opinion of the Attorney General is issued in response to your request on behalf of the Tuscaloosa County Commission.

### QUESTION 1

Does the provision of sanitary sewer service to private residences at taxpayer expense violate the provisions of section 94 of the Constitution of Alabama?

### FACTS AND ANALYSIS

In your opinion request, you state, in pertinent part, as follows:

The Tuscaloosa County Commission has proposed to construct a sewer line to serve a limited number of residents outside the corporate limits of the City of Tuscaloosa, but within the city's police jurisdiction. By agreement with the city, the county will hire a contractor to construct the line, and upon completion of the construction, the city will accept it into their system and maintain the line. The county has applied to the Alabama Department of Economic and Community Affairs ("ADECA") for funds to construct the line, but the project has been rejected twice because of a combination of factors, including the income level of the residents and the low failure rate of septic systems in the area proposed to be served.

Despite the failure of the project to meet the objective criteria used by ADECA, the county commission has voted to hire a consulting engineer to design the project to be let for bids. The county commission proposes to provide this benefit to an identified group, at no cost to the group's members.

Section 94 of the Constitution of Alabama, as amended by Amendment 558, prohibits a municipality or county from granting money or a thing of value in aid of any individual, association, or corporation. ALA CONST. art. IV, § 94 (amends. 112, 558). The Alabama Supreme Court interpreted section 94 as allowing appropriation of public revenues in the aid of an individual, association, or corporation only when the appropriation is for a "public purpose."

*Slawson v. Ala. Forestry Comm'n*, 631 So. 2d 953, 956 (Ala. 1994). The county may contribute public funds for construction on private property if it finds the sewer line serves a "public purpose."

A public purpose, generally speaking, "has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community." In *Opinion of the Justices* No. 269, 384 So. 2d 1051 (Ala. 1980), the Supreme Court of Alabama set out the test to be used in determining whether a public purpose is served. The Court stated as follows:

The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit. . . . The trend among the modern courts is to give the term "public purpose" a broad and expansive definition.

*Id.* at 1053. In an earlier opinion of the Court on the same issue, the Court stated that "the question of whether or not an appropriation was for a public purpose [is] largely within the legislative domain rather than within the domain of the courts." *Id.* at 1052; *see also*, *Opinion of the Justices* No. 261, 373 So. 2d 290, 292 (Ala. 1979).

Based on the above, the determination of whether a public purpose will be served is a factual determination that can only be made by the governing body. Opinion to Honorable Frank P. ("Skippy") White, Member, House of Representatives, dated December 13, 2004, A.G. No. 2005-029. Thus, the Tuscaloosa County Commission must decide whether improvements to the property of 84 property owners benefit the county as a whole. See, generally, the following opinions to:

- Honorable John Harrison, Director, Alabama Department of Economic and Community Affairs, dated February 3, 2003, A.G. No. 2003-074 (concluding that a local government can only expend public funds to improve private property if the governing body of the local government first decides that a public purpose will be met by the expenditure of federal funds to connect low-to-moderate income individuals to the water and sewer line); and to
- Honorable Jeff Collier, Mayor, Town of Dauphin Island, dated March 31, 1999, A.G. No. 99-00152 (concluding that public funds could be used to aid construction of a sand berm on Dauphin Island that would directly benefit the homes and homeowners in front of the berm, as well as serve a public purpose by protecting the town's

beaches and sanitary sewer system, which serves all the town's inhabitants).

### CONCLUSION

If the Tuscaloosa County Commission determines the provision of sanitary sewer service to a select group of private residences would serve a "public purpose," the county may contribute public funds to construct a sewer line without violating section 94 of the Constitution of Alabama.

### QUESTIONS 2 AND 3

Is the county allowed to enter private property to place lateral lines for the purpose of hooking individual residences up to the sewer system?

If so, is the county required to assess the cost of the improvements against the property owner as in Opinions 80-00172, 91-00097, 91-00406, 95-00029, and 2001-188?

### FACTS AND ANALYSIS

Questions similar to the ones you pose have been addressed by this Office in several previous opinions. In your second question, you list many of these previous opinions, which directly answer either one or both of the questions that you have asked. We see no reason for this Office to diverge from the sound reason previously reached with regard to these matters. As such, a brief recitation of the conclusions reached in those opinions follows.

The opinions referenced in your question all deal with municipalities. From those opinions, it is gleaned that a municipality may not perform work on that portion of water and sewer lines located on private property. Opinion to Honorable J. Edward Yeargan, Mayor, City of LaFayette, dated May 19, 1981, A.G. No. 81-00383. More pointedly, this Office has stated that it is the responsibility of the customer to "tie on" to the water main by installing connection lines. Opinion to Honorable Douglas Whitman, Mayor, Town of Camp Hill, dated September 6, 1991, A.G. No. 91-00406.

There are exceptions to this general rule where there is enabling legislation, a health hazard, or where the city caused the damage. Opinions to Honorable Elizabeth S. Parsons, City Attorney, Town of Riverside, dated May 25,

2001, A.G. No. 2001-188; and to Honorable John E. Adams, Attorney for the Town of Grove Hill, dated November 4, 1982, A.G. No. 83-00065. In the *Whitman* opinion, this Office stated that a municipality may work on water and sewer lines located on private property if class legislation exists that: (1) permits the work to be done by the city; (2) requires the city to receive full reimbursement for the labor, materials, and equipment; and (3) provides a certainty that the city will be paid. *Whitman* at 2-3; opinion to Honorable Paul B. Anderson, Mayor, City of Marion, dated May 4, 1989, A.G. No. 89-00270.

There is no specific statutory authority that authorizes a county to enter private property to lay lateral lines for connection to a sewer system. Although none of the previously referenced opinions have been applied to a county authority, it is the opinion of this Office that the tenets of these opinions are applicable to counties. Moreover, this Office has reached similar conclusions in matters where the county was the governing authority. Specifically, in an opinion to Honorable Stanley A. Martin, Attorney, Lee County Commission, dated March 1, 2005, A.G. No. 2005-077, this Office stated that the county generally is not responsible for a drainage easement located on private property unless damage was done to the easement through some fault of the county. Also, in an opinion to E.G. Griffin, Chairman, Lineville Water & Sewer Board, dated January 23, 1980, A.G. No. 80-00172, regarding the ability of the water and sewer board to lay water and sewer lines on private property, this Office stated that a violation of section 94 would not occur if the board received full remuneration for the labor, materials, and equipment used and provided no work inside the private residence.

Based on the foregoing, it is the opinion of this Office that, generally, a county should not enter private property to place lateral lines for the purpose of hooking an individual residence on to a sewer system. In instances where such action is nevertheless taken, the county must receive full remuneration from the property owner or some other funding source to avoid violating section 94 of the Constitution of Alabama. *See Whitman* at 2 (stating that the use of community development block grant funds to rehabilitate privately owned property does not violate section 94 of the Constitution of Alabama).

### CONCLUSION

A county governing authority should not enter private property to place lateral lines for the purpose of hooking individual residences up to a sewer system. In instances where such action is taken by the county, to prevent a violation of section 94 of the Constitution of Alabama, the county is required to assess all costs associated with such action to the private property owner.

do so. . . . [A]fter 10 days' notice, to make the connection, the town or city may cause the same to be made at such owner's expense and the cost thereof shall be a lien on such property. . . .

ALA. CODE § 11-50-54 (2008).

The county is not authorized to require individuals to connect to a county sewer system when that individual has a functioning septic system. Further, the county does not have authority to require an individual to connect to a sewer system owned by another governing authority. A municipality is under no affirmative duty to provide sewer services to individuals or businesses located within its police jurisdiction. *See, generally, City of Attalla v. Dean Sausage Co.*, 889 So.2d 559 (Ala. Civ. App. 2003); opinion to Honorable Blaine Galliher, Member, House of Representatives, dated January 5, 2005, A.G. No. 2005-038.

A county and a city have the authority to enter into a contract for the joint exercise of any power or service that each of the contracting entities has the authority to exercise individually. ALA. CODE §§ 11-102-1 to 11-102-8 (2008). At least one of the contracting parties must have the authority to exercise the power or service in the manner agreed upon in the contract. ALA. CODE § 11-102-1 (2008). A municipality, as mentioned above, has the authority to compel persons with septic tanks to tie on to a municipal system. Accordingly, the county may compel individuals to tie on to the municipal sewer system if the agreement between the city and the county in which the city agrees to accept the sewer line also includes a provision requiring individuals to tie on to the municipal system.

#### CONCLUSION

The county does not have the authority to require individuals with a functioning septic system to tie on to the city's sanitary sewer system unless the agreement between the county and the city requires the individuals to tie on to the municipal system.

#### QUESTION 5

Does the provision of sanitary sewer service at no cost to a select group of individuals create an equal protection claim under the United States Constitution and the Constitution of Alabama by those not served?

QUESTION 4

Does the county have the authority to require individuals with a functioning septic system to tie on to the city's sanitary sewer system?

FACTS AND ANALYSIS

Your question is one of blended authority. Section 11-3-11(a)(15) of the Code of Alabama gives the county, as follows, the power to require property owners to connect to the county sewer system: "The county commission shall have the power to require owners of property in the county to connect to its sewer system any facilities used in the collection or disposal of sewage." ALA. CODE § 11-3-11(a)(15) (2008). The section further states that "[no] county commission shall have the power to require any owner of property to connect to a county sewer system if . . . the property of such owner is served by a septic tank installed as of the prospective connection date." ALA. CODE § 11-3-11(a)(15)(ii) (2008).

Your request indicates that the recipients of the proposed sewer system currently have functioning septic systems. Because the Code of Alabama specifically prohibits the county from compelling individuals to tie on to a county sewer system when such individuals have a septic system, Tuscaloosa County may not compel individuals with septic tanks to tie on to its sewer system.

Sections 11-50-53 and 11-50-54 of the Code give municipalities the power to require individuals to connect to the sewer system of the town or city. These sections respectively state, in pertinent part, as follows:

All cities and towns of this state shall have the power to establish or build drains and may require private or public premises to be connected with the sewer system for proper drainage or sanitation and shall have the power to regulate the manner of connection therewith. . . .

ALA. CODE § 11-50-53 (2008).

All cities and towns of this state . . . may regulate and compel the connection of private or public premises with the sewer system of the town or city, and the council or other governing body shall have the power to punish the owner of any property who shall fail to make such connection, after 10 days' notice to

FACTS, ANALYSIS, AND CONCLUSION

Whether benefit to a select group of individuals raises a possible equal protection claim requires an interpretation of federal constitutional law. Because it is a question of federal law, this Office cannot issue a ruling as to its interpretation. Opinion to Honorable John D. Long, Mayor of Hartselle, dated August 1, 1988, A.G. No. 88-00395. Further, it is a longstanding policy of this Office not to rule on constitutional issues. Opinion to Honorable Patrick H. Boone, Attorney, City of Vestavia Hills, dated February 28, 1997, A.G. No. 97-00122. Thus, this Office declines to answer this question.

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