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October 9, 2012

Honorable Brenda Gale Blalock
City Clerk, City of Montgomery
Post Office Box 1111
Montgomery, Alabama 36101-1111

Municipalities – Municipal Funds – Settlements – Litigation – Montgomery County

The City of Montgomery may not pay compensation to a private citizen that is not for a public purpose authorized by a local act or other law.

Dear Ms. Blalock:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Montgomery.

QUESTION

May the City of Montgomery grant or appropriate $125,000 of city funds to a private citizen for actions committed in 1975 by a police officer of the city?

FACTS AND ANALYSIS

According to your request, the relevant facts are as follows:

Bernard Whitehurst was shot by a police officer for the City of Montgomery who mistook him for a suspect in a local robbery on December 2, 1975. The fatal shot was fired by former police officer Donald Foster. Mr. Foster is deceased.

Although none of the officers in the vicinity of Mr. Whitehurst's body found a gun near the body, a

detective subsequently called to the scene spotted a gun twenty-seven inches from the victim. It was later discovered that the gun had been confiscated by police in a drug raid occurring over one year prior to the Whitehurst shooting. The matter was presented to both federal and state grand juries, but no indictment was returned. There were, however, three officers indicted for perjury based on their statements regarding the gun that had previously been confiscated by police during the drug raid.

Ida Mae Whitehurst, mother of the deceased and administratrix of his estate, brought suit under 42 U.S.C. §§ 1983, 1985, and 1986 claiming that the fatal shooting and alleged cover-up, accomplished under color of state law, deprived her son of rights guaranteed by the fifth, sixth, thirteenth, and fourteenth amendments to the United States Constitution. The district court found that her claim under § 1983 for the purported cover-up did not exist since, if it took place at all, it was subsequent to Whitehurst's death, and consequently could not have deprived him of any rights. The court also determined that no claim was stated under § 1985 because any conspiracy to violate Whitehurst's civil rights ended with his death and could not be retroactively established.

The court then granted summary judgment in favor of all defendants involved in the investigation of the shooting. A directed verdict was granted in favor of James Robinson, mayor of Montgomery, who had been charged with gross negligence in hiring Foster and in retaining him on the police force. A jury returned a verdict exonerating Foster and his superiors–Ed Wright, public safety director, and Charles Swindall, chief of police–from liability for Whitehurst's wrongful death. The findings of the trial court were affirmed by the Fifth Circuit.

At a city council meeting held on June 5, 2012, an attorney and the family of Bernard Whitehurst addressed the city council and asked for an apology from the City of Montgomery and for $125,000 as

> compensation for the events that occurred in 1975. On June 19, 2012, the council passed a resolution expressing sorrow, regret, sympathy, and condolences to the family from the city and a resolution to erect a historic marker.

Section 94 of the Constitution of Alabama provides as follows:

> The Legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any corporation, association, or company, by issuing bonds or otherwise . . . .

ALA. CONST. art. IV, § 94 (amends. 112, 558). It has been interpreted as "allowing the appropriation of public revenues in the aid of an individual, association, or corporation only when the appropriation is for a 'public purpose.'" *Slawson v. Alabama Forestry Comm'n*, 631 So. 2d 953, 956 (Ala. 1994).

> 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 expansive definition.

Id., *quoting Opinion of the Justices* No. 269, 384 So. 2d 1051, 1053 (Ala. 1980). "[T]he 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.*

In further interpreting *Slawson*, this Office explained the required public-purpose analysis as follows:

> To determine whether such a purpose is public, the [governing body] must look to the statutes setting forth the powers of [the entity]. If, within such powers, there exists the authority to promote [the action at issue], then the [body] need only decide

> whether [the expenditure] will help to accomplish that purpose.

Opinion to Honorable Hubert M. Norris, Chairman, Fayette County Commission, dated July 15, 2010, A.G. No. 2010-081 at 2, *citing* opinions to Honorable W. Phil Eldridge, Attorney, Geneva County Commission, dated May 7, 2007, A.G. No. 2007-093; and to Honorable Robert S. Presto, Escambia County Attorney, dated August 24, 1995, A.G. No. 95-00299 (brackets added).

In addition to public purpose, this Office has also explained that "the action must be consistent with an authority granted to the entity." *Norris* at 2; opinion to Honorable Lee H. Warner, Executive Director, Alabama Historical Commission, dated March 28, 2003, A.G. No. 2003-114 at 5.

In determining the breadth of municipal authority, this Office has relied upon the Dillon rule. "The Dillon rule is a fundamental principle of public law in Alabama. It stands for the proposition that the authority of a municipality to engage in spending must either be ***express***, ***implied***, or the authority must be ***essential to the operation of the municipality***." Opinion to George Andrew Monk, Anniston City Manager, dated April 6, 2007, A.G. No. 2007-074 at 2 (emphasis added). The Dillon rule, in pertinent part, provides as follows:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation–not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby.

1 Dillon, *Law of Municipal Corporations*, 448-49 (5th Ed.).

In a separate opinion to the Honorable George Andrew Monk, this Office stated that, "[i]f the ability of the municipality to act is subject to ***reasonable doubt***, the power does not exist." Opinion to Honorable George Andrew Monk,

Anniston City Manager, dated April 5, 2007, A.G. No. 2007-073 at 2 (emphasis added).

Counsel for members of the Whitehurst family has suggested to this Office that *Stone v. State ex rel. Horn*, 251 Ala. 240, 37 So. 2d 111 (1948) authorizes the city to make the contemplated expenditure consistent with Section 94. In *Stone*, the Court upheld a local act requiring the appropriation of county funds to a private citizen who "was injured when the automobile in which she was riding ran into a washed out bridge on a certain county road, whereby certain specified injuries occurred." *Id.* at 112. The Court explained that, even though the county was not liable for the traveler's injuries, money could be appropriated for the public purpose of "satisfy[ing] a moral obligation based on legal standards." *Id.* at 144.

Two factors led the Court to conclude that the appropriation in *Stone* was such an appropriation. First, the Court explained that, by enacting the local law, the Legislature had found that the traveler's "circumstance gave rise to a moral obligation" and "the finding would not be disturbed unless it was clearly wrong." *Id.* at 113. Second, the Court explained that "the circumstances on which [the injured person's claim] is founded would create a legal claim against an individual or private corporation." *Id.* at 114. The Court therefore stressed that the payment was not merely "a courteous or generous act" but "relat[ed] to a just claim for financial aid on principles of good faith and legal standards having support in fair play." *Id.* at 114.

Stone underscores that the city lacks the authority to make the appropriation contemplated here. In this instance, there is no local act or other law evidencing the conclusion of the Legislature that the payment to the Whitehurst family is compelled by a moral obligation. There is also no indication that the payment is based on legal standards. Given that the civil rights action filed by the Whitehurst family was based on federal laws that apply to government entities, it seems clear that the city would not be liable if it were an individual or private corporation. Moreover, the family's civil rights action was litigated and resolved *against* the Whitehurst family. Finally, the requested sum of payment—$125,000—appears to be unmoored from any legal standard of just compensation and would merely be a "courteous or generous act."

The actions of certain Montgomery police officers in 1975 "shook the entire Montgomery law enforcement community and precipitated the resignation of the city's mayor, its public safety director, and several of its police officers." *Whitehurst v. Wright*, 592 F.2d 834, 836 (5th Cir. 1979). It was appropriate for the city council to express its sorrow, regret, sympathy, and condolences for those actions. There is, however, no statutory provision or other law that

expressly or impliedly authorizes the City of Montgomery to make the contemplated expenditure, and no legislative body has concluded that the payment would be for a public purpose that is consistent with authority granted to the city. Moreover, the proposed payment does not satisfy any legal standard of just compensation.

The events giving rise to the claim occurred over 30 years ago were investigated by both federal and state authorities and were extensively litigated, resulting in judgments that exonerated the city's agents from civil liability. Accordingly, it is the opinion of this Office that the City of Montgomery may not pay $125,000 as compensation to the family of Bernard Whitehurst for events that occurred in 1975.

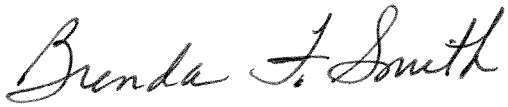
CONCLUSION

The City of Montgomery may not pay monies to a private citizen based on actions committed in 1975 where there is no civil liability, no legislative authorization, no finding of public purpose, and where the payment is not based on legal standards.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



BRENDA F. SMITH
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