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July 23, 2015

Honorable Stevan H. Parsons
Mayor, Town of Sylvan Springs
100 Rock Creek Road
Sylvan Springs, Alabama 35118

Municipalities – Streets – Conflicts
of Interest – City Council Members –
Gifts – Limited Liability Company –
Real Property – Jefferson County

The Town of Sylvan Springs
("Town") may not accept a gift of
undeveloped lots from a limited
liability company in exchange for an
agreement from the Town to
complete and repair roads within a
subdivision developed by the limited
liability company where the Town
intends to sell the undeveloped lots
to offset the cost to complete and
repair the roads.

Dear Mayor Parsons:

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

QUESTION

May the Town of Sylvan Springs accept a
gift of undeveloped lots from a limited liability
company in exchange for an agreement from the
Town to complete and repair roads within a
subdivision developed by the limited liability
company where the Town intends to sell the

undeveloped lots to offset the cost to complete
and repair the roads?

FACTS AND ANALYSIS

This Office has previously opined that a member of the Town Council for the Town of Sylvan Springs may not convey lots in a subdivision that he or she developed to the Town upon an express condition that the Town will complete and maintain the streets of the subdivision. Opinion to Honorable Stevan H. Parsons, Mayor, Town of Sylvan Springs, dated November 21, 2014, A.G. No. 2015-017. In your most recent request dated May 6, 2015, however, you informed this Office that the developer is no longer a member of the Town Council.

You further inform this Office that the company of the former member of the council began construction of the subdivision in 2003. Because of the economic climate, several lots within the subdivision were never sold. Additionally, the roads within the subdivision were never dedicated to the Town, nor has the Town accepted responsibility for the roads. The roads are incomplete and deteriorating. The situation has escalated to the point where the Town believes litigation against the developer is imminent, and the Town itself has been pressured to intervene. It has been proposed that several of the remaining lots within the subdivision be gifted to the Town in exchange for the Town undertaking the responsibility for the completion and maintenance of the subdivision streets. Pursuant to this proposal, it is suggested that the lots could eventually be sold by the Town to recover its costs.

Generally, subdivision streets within a municipality that are to be dedicated to a municipality are designated as such in the plat or map filed pursuant to section 35-2-51 of the Code of Alabama. ALA. CODE § 35-2-51 (2014). The dedication of subdivision streets is not effective unless approved by the municipality. ALA. CODE § 35-2-52 (2014); *Oliver v. Water Works & Sanitary Bd.*, 261 Ala. 234, 73 So. 2d 552 (1954). A town council may only accept streets after review by the municipal planning commission. ALA. CODE § 11-52-34 (2014). Where there has been no dedication and acceptance, a city has no authority or obligation to maintain private property. *Id.*; Opinion to Honorable Al Kelley, Mayor, City of Millbrook, dated August 4, 1997, A.G. 97-00249. According to your request, the subdivision streets have been neither dedicated nor accepted, but the developer now, after several lots have already been sold

and with the streets in dilapidated condition, proposes to dedicate the streets to the Town, and the Town proposes to accept the dedication.

When accepting privately owned roads, this Office has cautioned that care should be taken not to violate the provisions of section 94 of the Constitution of Alabama, which prohibits a municipality from granting money or other thing of value in aid of private persons. Opinion to Honorable Nicholas Hare, Jr., Monroeville City Attorney, dated April 2, 2004, A.G. 2004-110. Municipalities may only appropriate money for a public purpose. *Id.*

This Office notes that the value to the developer in this instance is compounded by the deteriorating condition of the streets and the threatened litigation. Even so, acceptance of the roads in question may serve a public purpose. This is a factual determination that must be made by the Town.

The proposal being contemplated, however, includes the additional question of the donation of residential lots from the developer to the Town to offset the cost to repair and maintain the subdivision streets. The Town has no intention to use the vacant lots. Rather, the Town intends to sell the lots to pay for the completion and maintenance of the streets. A casual observer cannot help but inquire as to why the developer cannot sell the vacant lots and repair the dilapidated streets. Why must the Town take on this obligation and risk? Indeed, this causes us to again caution that the Town may not appropriate or lend its credit in aid of private persons. *Hare* at 3.

Assuming that the vacant lots are sellable on the open market, the “gifting” of the vacant lots, as proposed, is actually payment to the Town for the assumption of the significant liability for the deeded roads. As noted in the previous *Parsons* opinion, this arrangement appears more closely akin to a contract than that of a gift or donation. *Parsons* at 3.

Section 11-40-1 of the Code provides that municipalities are authorized to “acquire property by *purchase*, gift, devise, or appropriation *for any municipal purpose* authorized in this title [title 11].” ALA. CODE § 11-40-1 (2008) (emphasis added). Additionally, section 11-47-20 of the Code authorizes municipalities to dispose of property upon the adoption of an ordinance determining that the property in question is not needed for any public or municipal purpose. ALA. CODE § 11-47-20 (2008). Your question, however, is essentially whether the Town can do both at the same time.

It should be noted that a municipality derives all of its power from the state, and no municipality can legislate beyond what the state has either expressly or impliedly authorized. *Arrington v. Associated Gen. Contractors of Am.*, 403 So. 2d 893, 902 (Ala. 1981), *cert. denied*, 455 U.S. 913 (1982); *Colvin v. Ward*, 189 Ala. 198, 201, 66 So. 98, 99 (1914). In a previous opinion to Honorable Brenda Gale Blalock, this Office summarized, as follows, limitations on municipal authority:

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*. 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.”

In a separate opinion to the Honorable George Andrew Monk [Anniston City Manager, dated April 5, 2007, A.G. No. 2007-073], this

Office stated that, if the ability of the municipality to act is subject to *reasonable doubt*, the power does not exist.

Opinion to Honorable Brenda Gale Blalock, City Clerk, City of Montgomery, dated October 9, 2012, A.G. No. 2013-005 at 4-5 (internal citations omitted) (bracketed material added) (emphasis in original).

Moreover, “[i]t is axiomatic that one may not lawfully do indirectly what is unlawful to be done directly.” *Barber v. Jefferson County Racing Ass’n, Inc.*, 960 So. 2d 599, 609 (Ala. 2006). Our research has revealed no statute that directly authorizes a municipality to purchase residential property for purposes of resale. Indeed, this Office has specifically rejected a similar proposal wherein a municipality proposed to actively acquire property, improve it, and thereafter lease the property. Opinion to Honorable Jimmy F. Carnes, City Attorney, City of Albertville, dated October 19, 1979, A.G. No. 80-00031. There, this Office concluded, “[i]t could hardly be said that the city would be acting in good faith in purchasing real estate with the idea in mind of immediately disposing of it.” *Id.*

Accordingly, it is the opinion of this Office that the Town may not purchase property that it has already determined will not be used for a municipal purpose. If, on the other hand, the Town was genuinely receiving the undeveloped lots as a bone fide gift and had yet to make a determination of whether the lots were suitable for a municipal purpose, the result would likely have been different.

Even though the council member is no longer on the town council, certain provisions of the Alabama Ethics Act may, nonetheless, be applicable. Accordingly, you should also direct your inquiry to the Alabama Ethics Commission.

CONCLUSION

The Town of Sylvan Springs may not accept a gift of undeveloped lots from a limited liability company in exchange for an agreement from the Town to complete and repair roads within a subdivision developed by the limited liability company where the Town intends to sell the undeveloped lots to offset the cost to complete and repair the roads.

Honorable Stevan H. Parsons
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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:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

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