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GUIDANCE FOR COUNTIES AND MUNICIPALITIES

FROM: Steve Marshall
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CC: John Porter, Opinions Division
SUBJECT: Amendment 772

During the COVID-19 pandemic, this Office has received numerous inquiries from counties and municipalities regarding whether a program could be developed using Amendment 772 (Section 94.01 of the Alabama Constitution) as a vehicle for giving economic development grants and loans to small businesses. While the desire to keep these businesses afloat during the crisis is understandable, unless the grants and loans contemplated under these proposed programs serve a public purpose rather than merely confer a private benefit, they violate section 94 of the Alabama Constitution.

Section 94

Section 94 prohibits the Legislature from “authoriz[ing] 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 (emphasis added).” ALA. CONST. art. IV, § 94. The Alabama Supreme Court, however, held in *Slawson v. Alabama Forestry Commission*, 631 So.2d 953, 956 (Ala. 1994) that Section 94, as amended, is not violated when the funds of a subject governmental entity are appropriated for a “public purpose.” Whether the funds are appropriated for a public purpose depends on if they bring about a “direct public benefit of a reasonably general character . . . to a significant part of the public” rather than merely a “remote and theoretical benefit.” *Id.*

Amendment 772

The Legislature passed Amendment 772 as a codification of *Slawson* insofar as economic and industrial development is concerned. Amendment 772 specifically gives a county or municipality authority “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 or the municipality.” ALA. CONST. art. IV, § 94.01(a)(3) (amend. 772). Before lending its credit or granting

public funds under Amendment 772, the county or municipality must comply with the following two requirements:

(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.

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

Application of Amendment 772

Although Amendment 772 gives counties and municipalities flexibility to grant or loan funds to private entities without violating section 94, the definition of “economic and industrial development” for purposes of Amendment 772 must be read in light of *Slawson*’s requirement that the benefit conferred be a “direct public benefit of a reasonably general character . . . to a significant part of the public.” Whether the expenditure is made for a public purpose is a factual question to be determined by the local governmental body making the expenditure by looking to the statutes setting forth that body’s authority. Opinion to Honorable Robert S. Presto, Escambia County Attorney, dated August 24, 1995, A.G. No. 95-00299.

Grants, loans, interest payments, and other similar awards to a private business for the sole reason of keeping that business operating would not meet the *Slawson* test. Whereas such payments would bestow a significant private benefit, any benefit to the public-at-large would be remote and indirect. The governing body of the county or municipality must be able to articulate a rationale for the expenditure which benefits the public-at large in a more direct manner and is supported by the governing body’s statutory authority. Furthermore, using entities such as the Chamber of Commerce or private banks as “pass-throughs” to facilitate the expenditures does not change this analysis so long as ultimately public money is being lent or granted in aid of a private entity and no public benefit is served. The following are examples in which this Office has found that an expenditure confers a direct public benefit in compliance with Amendment 772:

- The Conecuh County Commission (“Commission”) may appropriate funds to the Town of Repton to complete a highway beautification project, purchase land for a farmer's market, and complete a welcome center for the purpose of promoting economic development. Opinion to Honorable Johnny Andrews, Chairman, Conecuh County Commission, dated January 14, 2014, A.G. No. 2014-038;
- 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. Opinion to Honorable J. Bradford Boyd Hicks, Attorney, Town of Magnolia Springs, dated June 29, 2009, A.G. No. 2009-086;
- A municipality, for less than adequate consideration, may convey real property owned by the city to the industrial development board for the board's use for the promotion of industry within the city, if the city council complies with the conditions of section 94.01 of the Alabama Constitution, including a determination that a public purpose is served by the transfer. Opinion to Honorable Rodney Edmondson, City Attorney, City of Arab, dated April 5, 2011, A.G. No. 2011-051;
- The City of Brewton may expend public funds and allow its employees, agents, or contractors to enter private property with the owner's consent to remove any unsightly and damaged trees if the city council determines that the work promotes economic and industrial development for the city and the council complies with the conditions of section 94.01(c) of the Recompiled Constitution of Alabama. Opinion to Honorable Yancey E. Lovelace, Mayor, City of Brewton, dated August 15, 2019, A.G. No. 2019-040;
- The City of Daphne may guarantee the mortgage of a nonprofit organization to support the construction of soccer fields for the purpose of promoting economic development if the city council complies with the conditions of section 94.01(c) of article IV or section 3 of the Local Amendments for Baldwin County of the Recompiled Constitution of Alabama. opinion to Honorable Jay M. Ross, Daphne City Attorney, dated November 18, 2016, A.G. No. 2017-006;
- The municipality may reimburse a public utility for the costs of relocating utility lines for the purpose of promoting economic development if the city council complies with the conditions of section 94.01(c) of article IV of the Recompiled Constitution of

Alabama. Opinion to Honorable Jerry Willis, Mayor, City of Wetumpka, dated March 24, 2017, A.G. No. 2017-025;

- The City of Roanoke may donate funds to the Rotary Club of Roanoke, a nonprofit organization, for the purpose of assisting with “The Theatre Project,” which is vital to the city's downtown revitalization plan and would attract new business. Opinion to Honorable John A. Tinney, Attorney, City of Roanoke, dated September 9, 2014, A.G. No. 2014-094.

Conclusion

While the Office sympathizes with the desire of municipalities to assist small business during the COVID-19 crisis, the current dire circumstances do not provide for a workaround to the requirements of Section 94 of the Alabama Constitution. As previous Attorney General’s Opinions have found, unless the grants and loans contemplated under these proposed assistance programs serve a public purpose rather than merely confer a private benefit, they violate section 94 of the Alabama Constitution.