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**STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL**

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Honorable Rachel Laurie Riddle
Chief Examiner
Department of Examiners of Public Accounts
401 Adams Avenue, Suite 280
Montgomery, Alabama 36104

Examiners of Public Accounts –
Public Funds – Public Purpose –
Federal Funds

A municipality or county expending Recovery Funds under the American Rescue Plan Act of 2021 must ensure that such expenditures are consistent with the provisions of the Alabama Constitution. Any decision that such provisions are preempted under federal law must be determined by a federal court.

Because section 94 of the Alabama Constitution applies to Recovery Funds, expenditures of those funds must serve a public purpose.

Section 68 of the Constitution precludes a local government from using Recovery Funds to retroactively grant premium or hazard pay to its officers and employees and from increasing the compensation of its officers in the middle of a term of office.

Dear Ms. Riddle:

This opinion of the Attorney General is issued in response to your request on behalf of the Department of Examiners of Public Accounts.

QUESTION

Do limitations placed on local governmental entities by the Alabama Constitution, such as sections 94, 68, and 68.01, apply to the funds received by such entities under the American Rescue Plan Act (“ARPA”)?

FACTS AND ANALYSIS

To aid state and local governments in their response to the negative health and economic consequences of COVID-19, Congress passed the American Rescue Plan Act (“ARPA”), codified under 42 U.S.C. 801, *et seq.*, which was signed into law by President Biden on March 11, 2021. Under 42 U.S.C. 803, ARPA provides for over 130 billion dollars “[i]n addition to amounts otherwise available” to be paid to States and territories as “Coronavirus State and Local Fiscal Recovery Funds (“Recovery Funds”),” which are to be distributed to local governments based on population. 42 U.S.C. 803 (West). The local governments may only use the funds for uses specified in the statute. You ask whether these local governments are limited further by provisions in the Alabama Constitution such as sections 94 and 68 when expending the funds received pursuant to ARPA.

When passing ARPA, Congress expressly limited the use of Recovery Funds pursuant to uses set out in the statute. According to 42 U.S.C. § 803(c)(1):

Subject to paragraph (2), and except as provided in paragraphs (3) and (4), a metropolitan city, nonentitlement unit of local government, or county shall only use the *funds* provided under a payment made under this section to *cover costs incurred by the metropolitan city,*

nonentitlement unit of local government, or county, by December 31, 2024—

(A) to respond to the ***public health emergency*** with respect to the Coronavirus Disease 2019 (***COVID-19***) or its ***negative economic impacts***, including ***assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality***;

(B) to respond to ***workers performing essential work*** during the COVID-19 public health emergency by providing ***premium pay*** to eligible workers of the metropolitan city, nonentitlement unit of local government, or county that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the ***provision of government services*** to the extent of the ***reduction in revenue*** of such metropolitan city, nonentitlement unit of local government, or county due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the metropolitan city, nonentitlement unit of local government, or county prior to the emergency; or

(D) to make ***necessary investments in water, sewer, or broadband infrastructure***.

42 U.S.C.A. § 803(c)(1) (West) (emphasis added). Based on this provision, a local government spending Recovery Funds must show that the payments are related to the public health emergency caused by the COVID-19 pandemic or its negative economic impacts and that they address concerns falling within four categories, including: economic losses suffered by households, small businesses, and nonprofits; premium pay for essential workers; the provision of government services reduced by the pandemic; and investments in infrastructure. *Id.*

On May 17, 2021, the Department of the Treasury issued an “Interim Final Rule” pursuant to its authority under 42 U.S.C. 803(f),

which authorizes it “to issue such regulations as may be necessary or appropriate to carry out this section.” 42 U.S.C. 803(f) (West); 31 CFR Part 35. According to the Interim Final Rule, “[a] State or Territory may not place additional conditions or requirements on distributions to nonentitlement units of local government or units of general local government [i.e., municipalities and counties] beyond those required by section 603 of the Social Security Act or this subpart [42 U.S.C. 803].” 31 CFR 35.12(d). Because this Office is limited to matters of state law, this opinion does not address the federal question of whether ARPA preempts state law. Opinion to Honorable Don Davis, Mobile County Probate Judge, dated Dec. 26, 2007, A.G. No. 2008-023. The Treasury Department should be contacted regarding its own interpretation of its Interim Final Rule. Ultimately, however, the preemption issue would be determined by a federal court.

Upon issuing its interim final rule, the Treasury Department offered Guidance including a “non-exclusive” list of eligible uses for Recovery Funds. For example, permissible expenditures addressing negative economic impacts under 42 U.S.C. 803(c)(1)(A) would include job training; deposits into the Unemployment Trust Fund to restore pre-pandemic balances; assistance to households affected by the pandemic such as assistance with food, rent, mortgage, and cash needs; assistance to aid small businesses in adopting safer operating procedures, endure shutdowns, and mitigating hardship through loans or grants to offset labor, mortgage, rent, utility, or other operating costs; affordable housing development through vouchers, counseling, and similar services; and educational services including assistance to poor school districts and academic programs. 31 CFR 35.6.

In your opinion request, you raise concerns that certain payments falling within the permissible parameters of ARPA would violate long-standing prohibitions set out in the Alabama Constitution. For instance, section 94 prevents 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” ALA. CONST. art. IV, § 94 (amend. 112, amend. 558). This provision appears to limit a county’s or municipality’s authority to expend Recovery Funds under 42 U.S.C.A. § 803(c)(1)(A), precluding them from directly granting funds to private individuals or entities who have been affected by the pandemic. Likewise, section 68 precludes counties and or municipalities from “grant[ing] any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or

contract made” and from “increase[ing] or decreas[ing] fees and compensation of such officers during their terms of office. . . .” ALA. CONST. art. IV, § 68. This provision limits a local government’s authority to award premium pay to essential workers for work already performed or to increase an officer’s compensation midway through his or her term of service.

The plain meaning of section 94’s prohibition of a local government from “grant[ing] public money” to a private entity applies to federal grant funds. Black’s Law Dictionary defines “public” as “relating to, or involving an entire community, state, or *country*.” *Public*, BLACK’S LAW DICTIONARY (11th ed. 2019). In line with this definition, this Office has held that “public funds” under the Public Works Law include federal funds and that projects funded by federal money must be competitively bid under its provisions. Opinion to Honorable Sarah L. Tate, The Housing Authority of the City of Fort Payne, dated Nov. 13, 1997, A.G. No. 98-00031. Furthermore, rather than being sent directly to private entities, the Recovery Funds expended under 42 U.S.C. § 803 pass through the treasuries of the local governments, which have discretion to spend the money for different uses approved under ARPA. This office held in its opinion to Honorable Stephen M. Cauthen, Executive Director, Alabama Soil and Water Conservation, dated Apr. 26, 2002, A.G. No. 2002-219, at p. 5, that, “while [funds from various sources including those received through federal grants] may not be considered “state funds,” they are public funds and must be expended as such.” *See also* Opinion to Honorable James R. Garner, Mayor, City of Piedmont, dated Jan. 7, 1982, A.G. No. 82-00136 (City councilmember could not be the recipient of Community Development Block Grant (“CDBG”) funds because, although CDBG funds come from the federal government, they pass through the municipal treasury.).

The Legislature has authorized both municipalities and counties to accept and expend federal funds. Sections 11-64-1, *et seq.* of the Code of Alabama sets out such authority for municipalities. ALA. CODE §§ 11-64-1 to 11-64-7 (2008). According to section 11-64-2:

Each *grantee* shall have the power, and, when approved by its governing body, the authority, to do or perform any one or more of the following:

- (1) To apply to any donor for a grant and to pay the expenses involved in making such application;

- (2) *To accept and receive grants from any donor;*
- (3) *To expend or apply the proceeds of any grant for the purpose or purposes for which the same is made;*
- (4) To agree to comply with the conditions of the grant;
- (5) To *pay over or donate or loan to* any board, authority or agency of the grantee, or to any municipality, or to any public corporation, or to any county or counties in the state or to the state, or to any board, bureau, authority, institution, or agency of the grantee, or of such public corporation, or of such county or counties, or of the state or to *any person, firm, or corporation*, any grant proceeds authorized or permitted to be so paid over, donated or loaned by the conditions of the grant.

ALA. CODE § 11-64-2 (2008). “Grantee” under section 11-64-1(5) includes of the Code, “[a]ny municipality, or any department, board, bureau, commission, or agency of any municipality, whether incorporated or not, acting on behalf of the municipality, or any public corporation, to which a grant is to be made.” ALA. CODE § 11-64-1(5) (2008). Likewise, the definition of “donor” under section 11-64-1(2) of the Code includes “[t]he United States” and its instrumentalities. ALA. CODE § 11-64-1(2) (2008). Finally, “grant” is defined broadly as “[a]ny gift, grant, appropriation, donation, or advance by any donor, whether absolute or conditional, *for any purpose.*” ALA. CODE § 11-64-1(4) (2008) (emphasis added). Sections 11-11B-1, *et seq.* of the Code, which are materially identical to section 11-64-1, *et seq.* of the Code, grant counties this same authority. ALA. CODE §§ 11-11B-1 to 11-11B-8 (2008).

The provisions and definitions set out above appear to give municipalities and counties the authority to accept federal funds and spend them “for any purpose” consistent with the federal requirements, including making grants to private entities. Section 11-64-7 of the Code (for municipalities) and section 11-11B-8 of the Code (for counties), however, caution that these provisions are “intended to grant additional authority to grantees, [municipalities or counties], and public corporations and *shall not be considered to repeal, restrict, or modify any law now in*

effect or hereafter enacted.” ALA. CODE § 11-64-7 (2008); ALA. CODE § 11-11B-8 (2008) (emphasis added). Therefore, a municipality’s or county’s authority to accept and expend federal funds must be read in conjunction with provisions in the Alabama Constitution such as section 94 and 68.

This Office, in its opinion to Honorable George C. Seibels, Jr., Mayor, City of Birmingham, dated May 15, 1975, cited to *Opinion of the Justs.*, 254 Ala. 343, 48 So. 2d 757 (1950), for the proposition that the City of Birmingham could use federal funds as part of a redevelopment plan for the rehabilitation of properties, including some that were privately owned, without violating section 94. *Seibels*, at p. 3. A close analysis of *Opinion of the Justs.*, however, reveals that the Alabama Supreme Court based its holding that such programs were permissible under section 94 because they served a public purpose. The happenstance that the program at issue in that case involved federal funds did not play a role in its analysis. *Id.* Accordingly, the following opinions of this Office are overruled to the extent that they hold that expenditures which would otherwise violate section 94, are permissible because they are funded by federal money:

- Honorable Bill J. Dukes, Mayor of the City of Decatur, dated Apr. 11, 1979, A.G. No. 79-00150;
- Mayor Johnny L. Ford, City of Tuskegee, dated Nov. 29, 1979, A.G. NO. 80-00103;
- Honorable Richard Arrington, Jr., Mayor, City of Birmingham, dated Jul. 21, 1980, A.G. No. 80-00469;
- Honorable T. Massey Bedsole, Hand, Arendall, Bedsole, Greaves, & Reaves, dated Sep. 23, 1980, A.G. No. 80-00587;
- Honorable Guy F. Gunter, III, Attorney, City of Opelika, dated Nov. 26, 1980, A.G. No. 81-00092;
- Honorable George A. Monk, Merrill, Porch, Doster, & Dillon, dated Feb. 1, 1980, A.G. No. 83-00160;
- Honorable R. R. Norman, Jr., Mayor, Town of Fort Deposit, dated May 19, 1988, A.G. No. 88-00292.

Although ARPA authorizes local governments to provide “assistance to households, small businesses, and nonprofits,” the plain terms of section 94 preclude the legislature from authorizing a municipality or county to grant funds directly to a private entity. 42 U.S.C.A. § 803(c)(1)(A) (West); ALA. CONST. art. IV, § 94 (amend. 112, amend. 558). In *Slawson v. Alabama Forestry Comm’n*, 631 So. 2d 953, 956 (Ala. 1994), however, the Alabama Supreme Court held that Section 94 is not violated when the funds of a governmental entity are appropriated for a “public purpose.” An expenditure has a public purpose if it “confers a direct public benefit of a reasonably general character, [i.e.] to a significant part of the public, as distinguished from a remote and theoretical benefit.” *Id.*, quoting *Clifford v. City of Cheyenne*, 487 P.2d 1325, 1329 (Wyo.1971). 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 Aug. 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. In the context of ARPA Recovery Funds, an expenditure to a private entity would serve a public purpose if the local government could point to a statutory basis for a function that would address the negative health and economic impact of the COVID-19 pandemic and would come within the permissible uses set out in 42 U.S.C. § 803(c)(1).

Examples of subjects in which local governments have statutory authority to play a role include care for the “poor and needy” and the “aged.” According to section 88 of the Constitution of Alabama, “[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.” ALA. CONST. art. IV, § 88. Based on this constitutional provision, the Legislature enacted section 22-21-291 of the Code, which “place[s] the ultimate financial obligation for the medical treatment of indigents on the county in which the indigent resides, for all those costs not fully reimbursed by other governmental programs or third-party payers.” ALA. CODE § 22-21-291 (2015). In its opinion to Honorable Charles E.

Nabors, CEO/Administrator, Bryan M. Whitfield Memorial Hospital, dated May 10, 1994, A.G. No. 94-00199, this Office held that Marengo County was required to compensate a hospital for its care of a qualified indigent resident of the County. Likewise, pursuant to section 38-2-9 of the Code, a municipality has “the power and authority to make other and further provision for the care of the poor and needy of the . . . municipality.” ALA. CODE § 38-2-9 (2012). Municipalities also have the authority under section 11-47-130 of the Code “to maintain the health and cleanliness of the city or town within its limits and within the police jurisdiction thereof.” ALA. CODE § 11-47-130 (2008).

Regarding to caring for the aged, section 38-1-6 of the Code provides:

The state government and all county and municipal governments in this state are hereby authorized to voluntarily participate in any program which is related to any form of assistance for the aged, including, but not limited to, such programs as senior citizens volunteers, foster grandparents, senior aids, various programs of the Federal Department of Health, Education and Welfare and any other program supported by the federal government, private foundations or other political or private organizations which establish assistance programs for the aged. Participation in said old-age assistance programs may be in the form of moneys, services rendered or any other form of voluntary participation available.

ALA. CODE § 38-1-6 (2012). *See* opinion to Honorable Milton E. Barker, Jr., Attorney for the City of Adamsville, dated Febr. 7, 2002, A.G. No. 2002-133 (Based on section 38-1-6 of the Code, the City of Adamsville may expend public funds to be distributed to senior citizens at Christmas time.). Accordingly, a city or county may expend funds if its governing body determines that such expenditures provide for the care of the poor and needy or the aged.

Section 11-96A-1, *et seq.*, of the Code, furthermore, specifically gives local governments the authority to provide for affordable housing for persons of low and moderate income and shelters, halfway houses, and emergency housing for homeless persons. ALA. CODE §§ 11-96A-1 to 11-

96A-6 (2008). Section 11-96A-3 of the Code authorizes them to acquire, construct, operate and manage affordable housing and to sell or lease such dwellings to persons of low or moderate income and shelters for the homeless. ALA. CODE § 11-96A-3 (2008). Accordingly, municipalities and counties may spend Recovery Funds on housing and shelters so long as such expenditures are related to addressing the economic impact of the COVID pandemic and are tailored toward providing shelter for the poor and needy. The above list is not intended to be exhaustive, but rather shows examples of how local governments can rely on their statutory authority to locate permissible uses for Recovery Funds.

You also ask whether Recovery Funds would be subject to section 68 of the Alabama Constitution. Section 68 prohibits local governments from retroactively granting extra compensation to its officers and employees and from changing the compensation of its officers in the middle of a term of office:

The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employee, agent or contractor, after service shall have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office; nor shall any officer of the state bind the state to the payment of any sum of money but by authority of law; provided this section shall not apply to allowances made by commissioners' courts or boards of revenue to county officers for ex officio services, nor prevent the legislature from increasing or diminishing at any time the allowance to sheriffs or other officers for feeding, transferring, or guarding prisoners.

ALA. CONST. art. IV, § 68. Therefore, a municipality or county may not grant premium or hazard pay retroactively to its own employees and may not grant such pay to officers in the middle of their terms of office. This provision would not preclude a local government from granting hazard pay prospectively to its employees and raising the compensation of officers at the beginning of a new term if circumstances warrant.

Furthermore, section 11-40-22 of the Code allows for municipalities to use a procedure comparable to hazard pay:

(a) Notwithstanding any limitations of law pertaining to the municipality, the mayor of any municipality in Alabama is hereby authorized, subject to budget restraints approved by the governing body, to make *cash or non-cash awards not to exceed \$1,000* to employees of the municipality in recognition of exemplary performance or for innovations that significantly reduce costs or result in outstanding improvements in services to the public.

(b) Any employee selected to receive a cash or non-cash award for exemplary performance or for innovations that significantly reduce costs must first be recommended by his or her supervisor and approved by the governing body of the municipality.

ALA. CODE § 11-40-22 (2008) (emphasis added). In its opinion to Honorable Glenda A. Morgan, Mobile City Clerk, dated August 26, 2007, A.G. No. 2007-129, at p. 2, this Office held that, to comply with both section 68 of article IV of the Constitution of Alabama and section 11-40-22 of the Code, an incentive plan must “provide for supervisory recommendation, approval of the governing body of the municipality, must state a quantitative amount that an employee can earn, and must be established prior to the beginning of the fiscal year.” Finally, although private employees would not be affected by section 68, any analysis of the permissibility of a local government providing premium or hazard pay to private employees would be subject to the analysis under section 94 as discussed above.

Any questions concerning the applicability of the State Ethics Law must be presented to the State Ethics Commission.

CONCLUSION

A municipality or county expending Recovery Funds under the American Rescue Plan Act of 2021 must ensure that such expenditures are consistent with the provisions of the Alabama Constitution. Any decision

Honorable Rachel Laurie Riddle
Page 12

that such provisions are preempted under federal law must be determined by a federal court.

Because section 94 of the Alabama Constitution applies to Recovery Funds, expenditures of those funds must serve a public purpose.

Section 68 of the Constitution precludes a local government from using Recovery Funds to retroactively grant premium or hazard pay to its officers and employees and from increasing the compensation of its officers in the middle of a term of office.

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

Sincerely,

STEVE MARSHALL
Attorney General

By:

A handwritten signature in black ink, appearing to read "Ben Baxley", written in a cursive style.

BEN BAXLEY
Chief, Opinions Division

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