Municipal business incentives, validity of

Number: INFORMAL

Date: May 11, 2011

Mr. Robert K. Robinson
North Port City Attorney
2070 Ringling Boulevard
Sarasota, Florida 34237

Dear Mr. Robinson:

You ask whether there is a conflict between Article VII, section 10, Florida Constitution, and section 166.021(9)(e)1.a. and b., Florida Statutes.

Article VII, section 10, Florida Constitution, provides in part that "[n]either the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person[.]" Section 166.021(9)(e)1.a. and b., Florida Statutes, provides:

"1. By January 15, 2011, and annually therafter, each municipality having annual revenues or expenditures greater than $250,000 shall report to the Legislative Committee on Intergovernmental Relations or its successor entity the economic development incentives in excess of $25,000 given to any business during the municipality's previous fiscal year. The Legislative Committee on Intergovernmental Relations or its successor entity shall provide the report to the Office of Tourism, Trade, and Economic Development. Economic development incentives include:

a. Direct financial incentives of monetary assistance provided to a business from the municipality or through an organization authorized by the municipality. Such incentives include, but are not limited to, grants, loans, equity investments, loan insurance and guarantees, and training subsidies.

b. Indirect incentives in the form of grants and loans provided to businesses and community organizations that provide support to businesses or promote business investment or development."

The above provisions of section 166.021(9)(e), Florida Statutes, were added by the Legislature in 2010.[1]

Initially, I must advise you that this office must presume the validity of a duly enacted statute until a court of competent jurisdiction declares otherwise.[2] As stated in this office's statement concerning Attorney General Opinions, a copy of which is enclosed, this office will not issue an opinion on questions requiring a determination of the constitutionality of an existing statute or ordinance in order not to intrude upon the constitutional prerogative of the judicial branch.

In an effort to be of assistance, however, I would generally note that the Florida Supreme Court in *Jackson-Shaw Co. v. Jacksonville Aviation Authority*[3] reviewed the case law relating to this constitutional provision in response to a certified question presented by the federal court[4] and stated:

"As used in article VII, section 10 of the Florida Constitution, the term credit 'implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.' *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971). This Court has also defined the lending of credit as follows:

'[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.'

State v. Hous. Fin. Auth. of Polk County, 376 So.2d 1158, 1160 (Fla.1979) (citing *Nohrr*, 247 So.2d 304). This Court has also explained that "[i]n order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody." *Nohrr*, 247 So.2d at 309.

If the State or a political subdivision has not given, lent, or used its credit, a project must merely serve a public purpose. *See State v. Osceola County*, 752 So.2d 530, 536 (Fla.1999). This Court has explained that under the public purpose test 'it is immaterial that the primary beneficiary of a project be a private party, if the public interest, even though indirect, is present and sufficiently strong.' *Hous. Fin. Auth. of Polk County*, 376 So.2d at 1160 (citing *State v. Putnam County Dev. Auth.*, 249 So.2d 6 (Fla.1971)). However, this Court has also cautioned that 'public bodies cannot appropriate public funds indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest.' *Id.* Even where there is no proposed public indebtedness, neither the State nor a political subdivision 'may expend public funds for or participate at all in a project that is not of some substantial benefit to the public.' *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875, 886 (Fla.1980)."

I trust you will understand that the duties of this office are prescribed by law. Thank you, however, for considering this office as a source of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tsh

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[1] Section 2, Ch. 2010-147, Laws of Fla.

[2] *See, e.g.*, Ops. Att'y Gen. Fla. 03-33 (2003). *Cf. Pickerill v. Schott*, 55 So. 2d 716, 719 (Fla. 1951); *Belk-James, Inc. v. Nuzum*, 358 So. 2d 174, 175 (Fla. 1978).

[3] 8 So. 3d 1076, 1095 (Fla. 2008).

[4] *See Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F. Supp. 2d 691 (M.D.Fla. 2007), *question certified*, 508 F.3d 653 (11th Cir. 2007), *certified question answered*, 8 So. 3d 1076, 1095 (Fla. 2008*), answer to certified question conformed to*, 562 F.3d 1166 (11th Cir. 2009).