



JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

State of Louisiana
DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE
70804-9005

JAN 23 2014
OPINION 13-0191

90-A-1 PUBLIC FUNDS & CONTRACTS
La. Const. art. VII, Sec. 14
La. R.S. 33:4712

Mr. Melvin Toomer
Councilman, City of Ponchatoula
125 West Hickory Street
Ponchatoula, Louisiana 70454

The City of Ponchatoula must follow La. R.S. 33:4712 when leasing surplus immovable property and must receive equal value under the terms of such lease. City may also allow the use of its property pursuant to a cooperative endeavor agreement authorized by La. Const. art. VII, Sec. 14(C). Any in kind contribution credit granted to non-profits under a lease or authorized cooperative endeavor agreement must only be granted when the City is able to demonstrate that it will receive an actual, quantifiable benefit from each activity for which it intends to award in kind contribution credit and that the amount of the in kind contribution credit granted is commensurate with the benefit received by the City.

Dear Mr. Toomer:

Your opinion request regarding leases between the City of Ponchatoula ("City") and several non-profit corporations has been assigned to me for research and reply.

According to your request and its attachments, the Board of Aldermen recently approved an ordinance to lease certain real property to non-profit corporations for a dollar amount plus in kind contributions to be received by the City. You ask about the validity of these leases and whether the City must follow La. R.S. 33:4712 when leasing public property. Your request states that the property being leased is "prime commercial property" that "is being leased for little or nothing."

In order to sell or lease public property, a municipality must follow the requirements set forth in La. R.S. 33:4712, which provides, in pertinent part, as follows:

A. A municipality may sell, lease for a term of up to ninety-nine years, exchange, or otherwise dispose of, to or with other political corporations of this state, or private persons, at public or private sale, any property, or portions thereof, including real property, which is, in the opinion of the governing authority, not needed for public purposes.

B. Except as otherwise provided in this Section, before disposition can be made of property under the provisions of this Subpart, an ordinance must be introduced, giving the reasons for the action on the part of the governing authority, and fixing the minimum price and terms of the sale, lease, exchange, or other contract to be made with reference to the property....

C. Any opposition to the proposed ordinance shall be made in writing, filed with the clerk or secretary of the municipality within fifteen days after posting of the above notice or its first publication. If an opposition is filed, the governing authority shall not adopt the ordinance until a hearing has been held. If the ordinance is adopted, it shall not become effective until ten days after its passage, during which time any interested citizen may apply to the district court having jurisdiction of the municipality for an order restraining the disposition of the property. After the ordinance becomes effective, it cannot be contested for any reason.

As you can see, La. R.S. 33:4712 provides that before the City can lease the public property in question, it must first declare that the property is no longer needed for public purposes. Then, an ordinance outlining the details of the proposed lease must be introduced. Notice of the proposed ordinance must also be given in order to give the public an opportunity to be heard on the proposed transaction. Subsection (C) of La. Rev. Stat. 33:4712 further provides that any opposition to the proposed ordinance shall be made in writing and if an opposition is filed, the City shall not adopt the ordinance until a hearing has been held. In the event the ordinance is adopted, it shall not become effective until ten (10) days after its passage. During this time, any person may seek a court order enjoining the lease of the property.

If the City decides the leased property cannot be deemed as "no longer needed for a public purpose," then the City could still allow a private entity to use space in the building pursuant to an authorized cooperative endeavor agreement. Cooperative endeavor agreements with private entities are authorized by La. Const. art. VII, Sec. 14(C), which states that, "for a public purpose, the state and its political subdivisions or political corporation may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual."

Although our office cannot make the factual determination of whether a cooperative endeavor agreement wherein the City would allow certain non-profits to use space in a public building for a set fee plus an in kind contribution legitimately serves a public purpose, we point out that Louisiana courts have generally interpreted the term "public purpose" broadly. In *State v. Wilson Co.*, 154 So. 636 (La. 1934), the Louisiana Supreme Court stated that a public purpose is "such a purpose as redounds to the public welfare." In earlier opinions, our office held that construction of roads serves a public purpose, a program designed to improve streets of an area serves a public purpose; leasing a portion of a publicly owned building to a post office serves a public purpose, and that a non-profit organization, which does work among the poor and needy serves a public purpose. See La. Atty. Gen. Op. Nos. 77-1023, 76-57, 76-1805, 09-0099, and 11-0239.

Regardless of whether the City leases the property pursuant to La. R.S. 33:4712 or enters into an authorized cooperative endeavor agreement with various private entities for the use of the building, the City has a duty to ensure compliance with La. Const. art. VII, Sec. 14(A). This constitutional provision is violated when a public entity gratuitously donates any public funds or property. *Board of Directors of the Industrial Development Board of the City of Gonzales, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales, et al.*, 2005-2298 (La. 9/6/06), 938 So. 2d 11, 20. It provides, in pertinent part, as follows:

Section 14(A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private ...

It has consistently been the opinion of this office that in order to comply with La. Const. art. VII, Sec. 14, a municipality must receive fair market value in exchange for the alienation of public property. For example, La. Att'y. Gen. Op. No. 13-0005 concluded that the Acadia Parish Police Jury could lease property to Second Chance Paws if such property is no longer needed for a public purpose, but noted that the police jury must receive lease payments that are commensurate with the fair market value of the property leased. Similarly, in La. Att'y. Gen. Op. No. 10-0287 we opined that voluntarily releasing a tenant from its lease, thereby giving up \$90,000.00 in revenue due to the Greater Krotz Springs Port Commission, would violate La. Const. art. VII, Sec. 14. La. Att'y. Gen. Op. No. 12-0134 concluded that a village may not allow a private water company to use, rent, or otherwise lease a publicly owned building without receiving fair market value in return. Finally, La. Att'y. Gen. Op. No. 10-0255 concluded that the City of Opelousas could not sell surplus immovable property for less than fair market value.

Our office has previously opined that fair market value means "the price at which property would change hands between a willing buyer and a willing seller when neither party is under any compulsion to buy or sell and both parties have reasonable knowledge of relevant facts." La. Att'y. Gen. Op. Nos. 09-0293, 08-0226, 06-0236. Black's Law Dictionary (9th ed., 2009) provides a similar definition of "fair market value": "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." We have often recommended an appraisal be obtained to determine the fair market value of a piece of property. See La. Att'y. Gen. Op. No. 10-0255 (stating, "we recommend that the City either obtain an updated appraisal taking into consideration the City's marketing of the property or obtain other detailed documentation that adequately demonstrates why and how the City determined that the fair market value of the property was less than the original appraised value."); see also La. Att'y. Gen. Op. No. 10-0215 (stating "we would recommend that the Town obtain an appraisal of the fire station and lots it would like to donate to the fire district in order to have an objective assessment of their value to ensure that the Town receives equivalent value for the

property."); see also La. Atty. Gen. Op. No. 09-0272 (stating "an appraisal of the land would be required to know exactly what value should be assigned to the donation of the land from the Hospital to the Police Jury."); see also La. Atty. Gen. Op. No. 01-0139 (stating, "we recommend that the Town obtain an appraisal of the value of the improvements to the lot, taking into account, of course, the depreciation of such over the term of the lease, to ensure that the rental payments are commensurate with the value of the improvements to the parking lot.").

Turning now to the specific leases or uses of City property, we call your attention to La. Atty. Gen. Op. No. 12-0082 which was issued to the City last year on a similar issue. The opinion asked whether the City could continue leasing certain property to non-profit corporations for a nominal amount. The opinion concluded:

Here, the City would only receive a nominal amount in exchange for giving up the use of its land to the nonprofits. Thus, the transfer of the use of the land in exchange for a nominal amount appears to be gratuitous on its face. Further, the City has no demonstrable, objective and reasonable expectation of receiving at least equivalent value in exchange for the transfer of the use of its land. Therefore, it is the opinion of this office that the City, by leasing its land to certain nonprofit organizations for a nominal amount, would violate La. Const. art. VII, § 14(A).

In response to La. Atty. Gen. Op. No. 12-0082, the City raised the amount each non-profit must pay the City for leasing the public property at issue. We affirm our conclusion in La. Atty. Gen. Op. No. 12-0082 and again note that a nominal lease amount violates La. Const. art. VII, Sec. 14. Our office has not seen an appraisal of the land and cannot determine what its fair market lease value would be. The City has the obligation to determine the correct fair market value and cannot lease the public property for less than that amount.

It appears from the documents submitted with your opinion request that the City intends to accept a monthly monetary payment from each non-profit but that it also intends to accept "in kind" contributions to count towards the total lease payment. In kind contributions are things of value and as such, may be taken into consideration by the City when performing its Article VII, Section 14 analysis as to whether it is receiving fair market value for the leased property. See La. Atty. Gen. Op. No. 12-0100. However, great care must be taken by the City to ensure that the City receives an actual, quantifiable benefit for any service or activity for which in kind contribution credit is granted and that the amount of the in kind contribution credit granted is commensurate with the benefit received by the City.

Attachments enclosed with your opinion request include lists from various non-profit corporations wherein each organization lists activities engaged in over the course of a year and a value is assigned to each activity. While we do not dispute that each of the

activities performed by the non-profits serve a good purpose, the City cannot award in kind contribution credit for every activity conducted by a non-profit using space in the City's building. The non-profit must be doing something that qualifies as a public purpose and for which the City would otherwise be authorized to undertake. In addition, the City must receive a quantifiable benefit from the project equal to the value of the use of public space. Several of the non-profit organizations which intend to lease space in the public building do good works which may benefit the City but which the City is either not authorized to undertake or which do not equal the value of the use of public space. Therefore, we urge extreme caution when the City chooses to award credit to a non-profit for work the organization would otherwise do at no cost to the City or which the City is not authorized to undertake or does not result in equal value. We also do not find any authority for the City to award in kind contribution for donations made by one non-profit corporation to other non-profit corporations.

When awarding in kind contribution credit, the City should not necessarily give credit to organizations in the same dollar amount the organization spent to undertake or accomplish the project; rather, the credit should be awarded in an amount that is reasonably and objectively received by the City as a result of the organization's work. We would encourage the City to retain adequate documentation to demonstrate how it came to the valuation of all in kind contribution credit awarded in the event the City is audited.

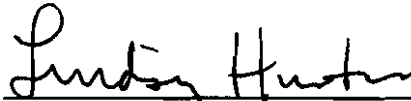
Accordingly, it is the opinion of this office that the City must follow La. R.S. 33:4712 when leasing surplus immovable property and must receive equal value under the terms of such lease. The City may also allow the use of its property pursuant to a cooperative endeavor agreement authorized by La. Const. art. VII, Sec. 14(C). The City must ensure that it receives fair market value for the use of its property under the terms of any lease or authorized cooperative endeavor agreement. In kind contribution credit granted to non-profits under such an authorized agreement must only be granted when the City is able to demonstrate that it will receive an actual, quantifiable benefit from each activity for which it intends to award in kind contribution credit and that the amount of the in kind contribution credit granted is commensurate with the benefit received by the City.

Finally, your request states your concern that the Mayor is on the board of directors of one of the non-profit corporations which is a party to the leases described above. Our office does not opine on the potential applicability of the provisions of the Louisiana Code of Governmental Ethics, La. R.S. 42:1111, *et seq.* Advisory rulings addressing questions under the Ethics Code are within the jurisdiction of the Louisiana State Board of Ethics. The Board may be contacted at the following address: P.O. Box 4368, Baton Rouge, LA 70821, or by phone at 225-219-5600.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

JAMES D. "BUDDY" CALDWELL
Attorney General

By: 
LINDSEY K. HUNTER
Assistant Attorney General

JDC/LKH/chb