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DEPARTMENT OF JUSTICE

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BATON ROUGE

70804-9005

December 19, 2014

OPINION 14-0162

90-A-1 PUBLIC FUNDS & CONTRACTS

La. Const. art. VII, Sec. 14

La. R.S. 33:4712

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St. James Parish is authorized to declare and sell immovable surplus property and should do so by passing an ordinance following the procedure set forth in La. R.S. 33:4712. In selling surplus immovable property, the Parish must ensure public notice of any such sale and the Parish must receive fair value. The Parish may use the services of a real estate agent to market surplus immovable property but must pay a reasonable hourly rate for his/her professional services rather than a commission out of the proceeds of the sale of public property.

Dear Mr. Mohon:

On behalf of the St. James Parish Government ("Parish"), you have asked for an opinion of this office on several issues surrounding the sale of surplus immovable property.

According to your request, the Parish is the owner of the St. James Parish Youth Center, which is located on approximately 36 acres of property. The Youth Center has been closed since June 30, 2013, and the Parish intends to sell the property as surplus immovable property to a private person(s) or entity. In light of these facts, you have asked the following questions:

1. Does the Parish have the legal authority to declare the immovable property as surplus property and, if so, should the declaration be done by ordinance or by resolution of the Parish Council?
2. Once the property is properly declared as surplus property, what are the methods and/or procedure to sell the immovable property?
3. Assuming that the Parish must first obtain an appraisal of the property, does the Parish have the authority to sell the surplus immovable property at an appraised value by sealed bid?
4. If no sealed bid is received at one hundred (100%) percent of appraised value, can the Parish request bids and sell the property at a percentage less than one hundred (100%) percent of appraised value?

5. Does the Parish have the authority to reduce the sale price incrementally to fifty (50%) percent of the appraised value or less?
6. Can the Parish employ the professional services of a commercial realtor to sell the property?
7. If the Parish is authorized to employ a commercial realtor, can the Parish pay the realtor a commission out of the proceeds of the sale as long as the commission is reasonable (i.e., 5% - 6% of sale proceeds) and/or can the Parish pay the realtor based on a reasonable hourly rate and/or some other reasonable fee?

St. James Parish is governed by a Home Rule Charter. Article II of the Charter provides as follows:

Except as otherwise provided by this charter, St. James Parish shall continue to have all powers, functions, rights, privileges, immunities, and authority previously possessed under the laws of the State. The Parish shall have and exercise such other powers, rights, privileges, immunities, authority, and functions not inconsistent with this charter as may be conferred on or granted to a local governmental subdivision by the constitution and laws of the State. The Parish is hereby granted the right and authority to exercise any power and perform any function necessary, requisite, or proper for the management of its affairs, not denied by this charter or general law, or inconsistent with the constitution. The parish shall have the right and authority to exercise general police power.

Your first question asks whether the Parish has the legal authority to declare immovable property as surplus and, if so, should the declaration be done by ordinance or resolution. As a general rule of law political subdivisions have a duty to dispose of their surplus property. In *Alexis v. Kare-Sue, Inc.*, 187 So. 2d 476, 477 (La. App. 4 Cir., 6/6/1966), the Louisiana Fourth Circuit stated: "[s]uch corporate political subdivisions of the state not only have the authority to sell, but also have the duty to sell and dispose of excess real property, and it is not necessary for the Legislature to say so in special enactment." Accordingly, the Parish has the legal authority to declare its immovable property surplus.

We next note while the Parish Charter does not provide a specific procedure that must be followed when declaring immovable property surplus Article IV, Sec. A of the Charter provides that any action which "abandons any property owned by the Parish" requires an ordinance. We also note past opinions of this office have concluded that in the absence of statutory authority setting forth a procedure which must be followed in declaring and selling surplus immovable property, parishes disposing of surplus immovable property may utilize the procedures used by municipalities in declaring and

selling surplus property as set forth in La. R.S. 33:4712. See La. Atty. Gen. Op. Nos. 09-0038, 07-0096, 03-0056 and 92-606. La. R.S. 33:4712 authorizes municipalities to sell, lease, exchange or otherwise dispose of property no longer needed for a public purpose and sets forth the following procedure to be followed:

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. In instances of exchanges of municipally owned immovable property valued at one hundred thousand dollars or more, the municipality, prior to introduction of the aforementioned ordinance, shall for a minimum of three times in thirty days advertise for and receive other proposals for the exchange of property comparable with the exchange of properties proposed by the municipality; however, exchanges involved in the relocation of public streets, roads, highways, servitudes, rights of way, and/or public franchises shall not be subject to this requirement. Thereafter, notice of the proposed ordinance must be published three times in fifteen days, one week apart, in a newspaper published in the municipality or, if there is no such newspaper, in a newspaper having a general circulation in the municipality, and if there is no newspaper of general circulation in the municipality, by posting in three public and conspicuous places in the municipality.

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.

Accordingly, it is a best practice for a political subdivision to follow the procedure outlined above in declaring and selling surplus immovable property when the law does not prescribe a different procedure to be followed. See La. Atty. Gen. Op. No. 01-06. Thus, in response to your first question, it is our opinion that the Parish is authorized to declare and sell surplus immovable property and should do so by passing an ordinance following the procedure set forth in La. R.S. 33:4712.

Your second question asks about the methods of sale for surplus immovable property.¹ While the general laws of this state do not set forth a specific procedure which must be followed for the actual sale of surplus immovable property, this office has consistently concluded that when a political subdivision sells immovable property which is no longer needed for a public purpose, such property should be sold only after giving public notice of the sale. See La. Atty. Gen. Op. No. 95-151, *citing* La. Atty. Gen. Op. No. 80-771. In La. Atty. Gen. Op. No. 01-06, we stated:

[I]t is public policy that property no longer needed for public purposes and sought to be sold should first be advertised as such to the general public. As pronounced in Atty. Gen. Op. No. 92-606, "notice to sell land is required because property devoted to public use by its very nature is held and owned by a political subdivision in trust for the use and benefit of its citizens." This publication and notice also allows opportunity for opposition to the proposed action to be made known. Thus, while there appears to be no known prohibition against private sale of surplus immovable property by a law enforcement district, as a matter of good public policy and out of an abundance of caution, it is the opinion of this office that the proposed sale of surplus immovable property be made public. The public disclosure provides equal opportunity to those who may be interested in purchasing the property as well as to those who may oppose such sale.

We also note that two public entities may agree to exchange public property under the provisions of the Local Services Law, La. R.S. 33:1324, without being bound by the advertising and bidding requirements set forth in La. R.S. 33:4712. La. Atty. Gen. Op. No. 14-0005. Further, our research did not reveal anything that would prohibit the Parish from selling the property by sealed bid as long as proper notice is given to the public. However, we call your attention to La. Atty. Gen. Op. No. 06-0236, which addressed whether a City could reserve the right to reject the highest dollar bid submitted and instead award the property to a lower bidder who would agree to use the property in a certain way. Finally, we call your attention to La. R.S. 41:1338 regarding offering property to be transferred back to the original grantor.

Your next two questions involve the appraisal and sale price to be received for the property. Every sale of surplus property must be examined in light of La. Const. art. VII, Sec. 14(A), which provides in pertinent part, as follows:

Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or any political subdivisions shall

¹ Please note that the procedures to be followed when selling surplus movable property differ from those available when selling surplus immovable property and are not discussed in this opinion. Also, we have assumed that the Parish is not interested in leasing the surplus immovable property in question and therefore, we have not included a discussion of the leasing options available to the Parish in this opinion.

not be loaned, pledged or donated to or for any person, association, or corporation, public or private.

In order to comply with La. Const. art. VII, Sec. 14(A), the Parish must ensure that it receives fair market value for the surplus immovable property it intends to sell. La. Atty. Gen. Op. No. 06-0236. Our office has previously opined that fair market value means "the price at which property would change hands between a willing buyer and willing seller when neither party is under any compulsion to buy or sell and both parties have reasonable knowledge of relevant facts." La. Atty. 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."

The determination of what amount constitutes fair market value is most commonly made by an appraisal of the property. However, we are aware that Louisiana courts have recognized that real property appraisal is not an exact science, but rather a subjective exercise. See *Transcontinental Gas Pipeline Corp. v. Louisiana Tax Com'n*, 2009-1988 (La. 3/16/10), 32 So.3d 199 (stating, "[t]his may be an imperfect appraisal system, as appraisal is an imperfect science to begin with"); *State Dept. of Transp. & Development v. Scramuzza*, 95-786 (La. App. 5 Cir. 4/30/96), 673 So.2d 1249, 1257 (noting "appraisal of land is not an exact science."). Once an appraisal is obtained, the fair market value of a piece of property can be further tested by offering the property for sale to the public, thereby subjecting the property to actual market conditions. La. Atty. Gen. Op. No. 06-0236.

We are aware that sometimes market conditions produce only offers which are below the appraised value. In the past, our office has determined that, in the absence of a new appraisal, such an offer can be accepted only if the public entity can adequately document in its files that the below appraisal bid reflects fair market value. In other words, the public entity must show and document that based on the market conditions, the marketing of the property, and other reliable information the value listed in the appraisal does not represent actual fair market value. In La. Atty. Gen. Op. No. 10-0255, we addressed whether the City of Opelousas could accept a bid on a parcel of surplus immovable property that was for less than the appraised value. Our office concluded as follows:

A bid for less than the appraised value may be accepted if the City can adequately document that the bid reflects fair market value. In order to ensure compliance with La. Const. art. VII, Sec. 14, 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.

Similarly, in La. Atty. Gen. Op. No. 11-0114, we opined that a law enforcement district may sell surplus immovable property to a private citizen who made an offer on the land after it was advertised and offered for sale to the general public. However, we noted that "if market conditions only produce an offer that is below the appraised value the offer may be accepted if the law enforcement district can adequately document for its file that the bid reflects fair market value." Adequate documentation that the sales price of property below the appraised value is not a violation of La. Const. art. VII, Sec. 14 will likely require the public entity to obtain a second or an amended appraisal which takes the marketing of the property and market conditions into consideration. We are not aware of any legal authority for the Parish to accept a bid of less than fair market value or for the Parish to reduce the sale price incrementally to 50% of the appraised value. Any reduction in the price of the property should be based on a new, amended appraisal or some other documentation that would show the fair market value of the property.

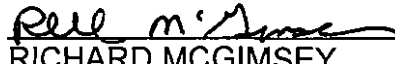
In response to your final two questions regarding whether the Parish may hire a real estate agent, we refer you to La. Atty. Gen. Op. No. 99-205, which concluded that a police jury could hire a real estate agent. However, the opinion concluded that the real estate agent could not be paid a commission out of the proceeds of the sale. We are not aware of any law that has been enacted or amended since this office issued La. Atty. Gen. Op. No. 99-205 which would cause us to reach a different conclusion. Therefore, it remains the opinion of this office that a public entity may not pay a real estate agent a commission out of the proceeds of the sale of public property; instead, the real estate agent should be paid a reasonable hourly rate for his/her professional services. This conclusion would not apply to those entities with statutes which specifically state that commissions may be paid to real estate agents. See, e.g., La. R.S. 41:140(D)(2).

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

Yours very truly,

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By:


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