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**State of Louisiana**  
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**OPINION 15-0137**

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**90-A-1 PUBLIC FUNDS & CONTRACTS**

La. Const. art. VI, § 23  
La. Const. art. VII, § 14  
La. R.S. 33:9020 et seq.  
La. R.S. 39:1430

The Carter Street No. 1 Economic Development District and the Town of Vidalia may not spend public funds in order to engage in the private enterprise of commercial real estate development, as such would be a violation of the prohibition against the use of public funds for private enterprise contained in La. Const. art. VII, § 14. Further, the District and the Town may not expend public funds to acquire and improve immovable property for sale or lease to private parties without objective evidence that economic development or growth would result from the project or without agreements in place with the private developers receiving the benefit of the use of public funds, as such would result in a violation of La. Const. art. VI, § 23 and La. Const. art. VII, § 14.

Dear Ms. Folsie:

On behalf of the State Bond Commission (the "Commission"), you have requested an opinion from this office regarding an application of the Carter Street No. 1 Economic Development District (the "District") to issue debt to purchase and develop multiple tracts of land for future economic development purposes in the Town of Vidalia ("Town"). The Town had previously submitted an application that was virtually identical to the one submitted by the District.

According to the information received by this office, the District has presented an application to the Commission seeking approval to incur debt in the form of a bond issuance for the purpose of financing an economic development project. The District intends to use the money received from the financing to purchase tracts of undeveloped land within the Town. The District also plans to use the funds to develop the land by building infrastructure on the property and zoning certain parcels of the land for commercial as well as residential uses. The District then intends to market and sell and/or lease the developed parcels to yet to be identified developers and others in the private sector to construct buildings on the property for the use and benefit of the private parties. The District has proposed this project as an important economic development project that will bolster the economy of the Town, thus benefiting the Town at large.

Further, the information provided to this office indicates that the bonds to be used by the District will be secured by all the revenues of the District, which will include a five (5) mills ad valorem tax, a two percent (2%) sales tax, and a two percent (2%) hotel

occupancy tax collected within the District. The bonds will also be secured by revenues provided to the District from the Town, pursuant to a Cooperative Endeavor Agreement (the "Agreement") between the Town and District. As no businesses or residents are currently located within the District, the revenues received by the District from the Town will be the primary revenues used in the payment of debt service for the bonds.

Currently, the District has no agreements or commitments in place with any private developers or other parties from the private sector for the purchase or development of any of the parcels in the proposed project site. The District only has the Agreement with the Town, which provides, primarily, that the Town will provide sufficient revenues to the District to pay debt service on the bonds.

You have asked multiple questions in regards to this application. First, you have asked if there are any legal issues with the application or the District's proposed financing plan, generally. If so, you have asked this office to elaborate on these issues and to provide direction as to how the Commission should handle the application.

Secondly, you have asked multiple questions related to provisions of the cooperative economic development law found at La. R.S. 33:9020, *et seq.* You note that La. R.S. 33:9038.33(C) and La. R.S. 33:9038.34(C) require baseline tax collection rates to be certified and published; however, you cannot clearly determine, based on the information provided by the District, whether this has been done or how it can properly be accomplished. Also, you point to La. R.S. 33:9038.33(F) and La. R.S. 33:9038.34(F), which allow only up to 75% of ad valorem taxes and 85%/80%/75%, respectively, of sales taxes to be leveraged. According to your request, a feasibility study has not been furnished, and without the same, the Commission staff cannot determine whether these statutory requirements will be met. According to statements made by bond counsel for the District, the bonds will be issued pursuant to La. R.S. 39:1430, and thus, the requirements of La. R.S. 33:9038.33 and La. R.S. 33:9038.34 are not controlling. You have asked whether the District can issue bonds pursuant to La. R.S. 39:1430 without having to follow the procedures outlined in the cooperative economic development statutes.

Third, you have asked a question related to the Agreement between the District and the Town. Specifically, you point to Section 5.02 of the Agreement, which essentially provides that the Town will agree to pay to the District any amounts necessary to pay debt service on any bonds issued by the District. In essence, the Town is guaranteeing the payment of debt service on the District's bonds. You have asked whether this creates a contingent liability on behalf of the Town that requires a separate application and approval by the Commission to be effective.

## **QUESTION 1**

As to your first question, you asked generally whether there are any legal issues regarding the District's application. In researching the matter, we have encountered several legal issues, which are addressed below.

### **1. Statutory Authority**

Before addressing the constitutional issues that may exist concerning this application, we must first address whether the District or the Town has the requisite statutory authority to enter into the proposed transaction. As stated previously, the District is seeking to use public funds to acquire immovable property for the express purpose of marketing and re-selling or possibly leasing the property to private parties after making infrastructure improvements to the property. The goal of the District or the Town in pursuing this project is to have the improved parcels sold to private developers for the development of commercial retail stores, hotels, and residential areas. The District has no existing agreements, contracts, or commitments from any private developers in place for the development of this property, and thus, the District and the Town are seeking to fund this project solely with public revenues derived from taxation in the hopes that private commercial and residential developers will purchase or lease the improved property and spur economic development.

In order to finance this project, the District is proposing to issue revenue bonds secured by future sales and ad valorem taxes from the project, also known as tax increments, as well as a pledge from the Town pursuant to the Agreement. According to information provided to this office, future tax increments will likely not produce sufficient revenues to pay debt service on these bonds for many years, and thus, the primary source of revenue pledged to pay debt service will come from the Town's pledge under the Agreement. Unlike the tax increments, which would be additional tax revenues that would not otherwise be available without the project, the revenues of the Town pledged under the agreement are revenues currently being levied by the Town that are available for other potential uses by the Town.

The authority to enter into this transaction purportedly derives from the Louisiana economic development law, titled Cooperative Economic Development, found at La. R.S. 33:9020, *et. seq.* An exhaustive reading of these statutes does not reveal any provision that expressly contemplates the transaction and project proposed by the District and the Town. Rather, the statutory authority for this transaction appears to result from general authority granted in various provisions of the economic development statutes.

La. R.S. 33:9023 allows for the creation of an economic development corporation and grants such corporations certain powers and authorities; however, La. R.S. 33:9034

allows local government subdivisions<sup>1</sup>, such as the District and the Town, to carry out the purposes of the economic development law directly without the need to create an economic development corporation. According to the information provided to this office, it appears as though the District was validly created as an economic development district by the Town pursuant to La. R.S. 33:9038.32. Such an economic development district is a political subdivision of the state and possesses such power and authority and has such duties as provided in the Cooperative Economic Development Law and other law. La. R.S. 33:9038.32(E).

La. R.S. 33:9023(C)(3) allows for the acquisition of property and the construction of capital improvements through cooperative endeavor agreements. La. R.S. 33:9023(C)(4) authorizes the sale, transfer, lease, or donation of property in order to carry out the objects and purposes of the economic development law.

An economic development district is authorized to engage in ad valorem tax and sales tax increment financing pursuant to the provisions of La. R.S. 33:9038.33 and La. R.S. 33:9038.34, respectively. Pursuant to La. R.S. 33:9038.33 and La. R.S. 33:9038.34, an economic development district is authorized to issue revenue bonds secured by increment tax revenues generated by an economic development project to finance a project determined by the issuer or local government subdivision to create economic development. Further, under Section E of both La. R.S. 33:9038.33 and 33:9038.34, a local government subdivision may pledge, in addition to tax increments, any funds held by the local government subdivision available for economic development as additional security for such bonds. Additionally, La. R.S. 33:9023(5) contemplates the issuance of ordinary revenue bonds of a local government subdivision, and La. R.S. 39:1430 allows for a public entity, such as the District and the Town, to issue revenue bonds for any authorized purpose.

Also, La. R.S. 33:9038.36 identifies the items which may be included in the costs of an economic development project. Such items include the costs of property acquisition, site preparation costs, construction costs, and costs of studies and development plans.

Considering the forgoing, it appears as though the District and the Town have general authority under the economic development law to engage in some of the activities proposed in the District's application. Despite this general authority contained in various provisions of the economic development law, there is no provision that expressly contemplates a project such as the one proposed by the District and Town. Unlike certain industrial inducement laws, such as those authorizing the development of industrial parks, nothing in the economic development law expressly authorizes a political subdivision to engage in real estate development activities without any commitments or cooperation of the private sector. If anything, the economic

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<sup>1</sup> La. R.S. 33:9022(4) defines "local government subdivisions" as "any parish, municipality, port commission, port harbor and terminal district, or any economic development district or authority created as a political subdivision of the state as defined in the Constitution of Louisiana."

development law contemplates the cooperation between public and private parties in increasing economic development, rather than a public entity acting on its own with public funds. The economic development statutes are titled "**Cooperative Economic Development Law**." La. R.S. 33:9020 (emphasis added). The legislature specifically acknowledges that "**public-private partnerships** which take advantage of the special expertise and experience of representatives of the private sector can be among the most effective programs to encourage and maintain economic development." La. R.S. 33:9021(8). The economic development law specifically requires political subdivisions to encourage the participation of private enterprises in economic development. La. R.S. 33:9038.37.

Although it appears that the District and the Town may be proposing a project and transaction that generally falls within the authority granted under the Cooperative Economic Development law, no provision of those statutes directly contemplate a transaction such as the one proposed in the District's application. The Cooperative Economic Development Law is presumed constitutional, and this opinion does not attempt to analyze the constitutionality of the Cooperative Economic Development Law. However, as the District and Town's proposed transaction and project are not directly contemplated by the law, the transaction and proposed project remains subject to the restrictions imposed by the Louisiana Constitution.

## 2. La. Const. art. VI, § 23 and Public Purpose

As previously referenced, the District intends to acquire immovable property with the proceeds of its bond issue. Such a transaction involves the acquisition of property by a political subdivision; therefore, the transaction must be analyzed under the provisions of La. Const. art. VI, § 23, which provides as follows:

Subject to and not inconsistent with this constitution and subject to restrictions provided by general law, political subdivisions may acquire property for any public purpose by purchase, donation, expropriation, exchange, or otherwise.

Although no definition of "public purpose" is included in Article VI of the Louisiana Constitution, the Constitution does contain a limited definition of "public purpose" in La. Const. art. I, § 4(B)(2). La. Const. art. I, § 4 concerns the rights of every person to acquire, own, control, and use their private property, and La. Const. art. I, § 4(B)(1) limits the taking or damaging of such private property by State and local governments for a public purpose. La. Const. art. I, § 4(B)(2) contains a definition for public purpose which, in part, states:

- (2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:
  - (a) A general public right to a definite use of property.

- (b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:
  - (i) Public building in which publicly funded services are administered, rendered, or provided.
  - (ii) Roads, bridges, waterways, access to public waters and lands, and other public transportation, access, and navigational systems available to the general public.
  - (iii) Drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally.
  - (iv) Parks, convention centers, museums, historical buildings and recreational facilities generally open to the public.
  - (v) Public utilities for the benefit of the public generally.
  - (vi) Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.
- (c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.

At first glance, it would appear that the definition of "public purpose" contained in La. Const. art. I, § 4(B)(2) applies to all acquisitions of property under La. Const. art. VI, § 23. However, upon further examination, we do not believe that to be the case. Rather, we believe that the definition of "public purpose" contained in La. Const. art. I, § 4(B)(2) only applies to the acquisition of property under La. Const. art. VI, § 23 when property is being acquired by expropriation. This belief is based on the conclusion that absurd consequences could result in applying La. Const. art. I, § 4(B)(2) to acquisitions of property other than by expropriation. Specifically, it could result in invalidating other sections of the Louisiana Constitution, which we do not believe to be the intent of La. Const. art. I, § 4(B)(2).

When a constitutional provision is plain and unambiguous, and its application does not lead to absurd consequences, its language must be given effect. *Retired State Employees Ass'n v. State*, 13-0499 (La. 6/28/13); 119 So.3d 568, 575. However, when a constitutional provision is not clear or leads to an absurd consequence, the determination of the intent of the provision becomes necessary. *Id.*

Although La. Const. art. I, § 4(B)(2) does specifically reference La. Const. art. VI, § 23, to conclude that limiting acquisitions of property to only those purposes identified in La. Const. art. I, § 4(B)(2) would result in absurd consequences. The primary absurd consequence would be that La. Const. art. VI, § 21 would be invalidated. La. Const. art. VI, § 21 allows a political subdivision to "acquire and improve industrial plant sites and other property necessary to the purposes thereof" in order to "induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area." If the phrase "public purpose" was limited to only the types of

properties and uses recited in La. Const. art. I, § 4(B)(2), then La. Const. art. VI, § 21 would essentially be nullified.

The more logical interpretation is that the limited definition of “public purpose” contained in La. Const. art. I, § 4(B)(2) applies only to acquisitions of property by means of expropriation. La. Const. art. I, § 4 is the constitutional provision dealing with expropriation. Thus, it is logical to conclude that the reference to La. Const. art. VI, § 23 contained therein was intended to only apply to acquisitions of property by expropriation.

The definition of public purpose contained in La. Const. art. I, § 4 was proposed by Act 851 of the 2006 Legislative Session. The Digest for Act 851 clearly states that the proposed constitutional amendment was to define “public purpose” for the purposes of expropriation under La. Const. art. I, § 4 and La. Const. art. VI, § 23. Additionally, the proposition approved by the voters stated that the constitutional amendment was “to define ‘public purposes’ relative to expropriation of property.” It appears that neither the legislature that proposed the constitutional amendment nor the people of Louisiana voting for the amendment intended that the definition of public purpose in La. Const. art. I, § 4 apply to anything other than expropriation of property.

The intent of the legislature is further evidenced by the fact that Act 851 was passed in response to a decision of the United States Supreme Court in *Kelo v. City of New London, Connecticut, et. al.*, 125 S.Ct. 2655, 545 U.S. 469; *rehearing denied* 545 U.S. 1158, 126 S.Ct. 24 (2005). In that case, the U.S. Supreme Court held that private property could be expropriated by a public entity in furtherance of an economic development project, and that such expropriation was a valid public purpose. *Id.* In response to that decision, many state governments, including Louisiana, sought to amend their constitutions to limit the definition of “public purpose” for the purposes of expropriation. Act 851 was Louisiana Legislature’s response to *Kelo*, and thus, it is logical that the Legislature intended only to define “public purpose” for the purposes of expropriation of property.

Having determined that the definition of “public purpose” contained in La. Const. art. I, § 4(B)(2) only applies to acquisitions of property by means of expropriation, we must next determine whether the District has established a valid public purpose to acquire the property under La. Const. art. VI, § 23.

According to the information provided to this office, the District is acquiring the property in the name of economic development. Although the Louisiana Constitution does not contain a definition of “public purpose” for the purposes of purchasing property under La. Const. art. VI, § 23, the Louisiana Legislature has declared that economic development is a valid public purpose. Under La. R.S. 33:9021(4), the Legislature declared that the maintenance of the economies of local political subdivisions is a public purpose for which public money may be expended. While this office agrees that economic development is a valid public purpose for the acquisition of property by a

political subdivision, there still remains a question as to what constitutes economic development.

Louisiana law contains no provisions defining economic development, and there are no provisions identifying exactly what must be provided to establish the existence of economic development as a public purpose. It appears that whether potential economic development exists sufficient to qualify as a public purpose for acquiring property is a factual determination based on objective evidence. For example, in *City of Shreveport v. Chanse Gas Corp.*, 794 So.2d 962 (La.App. 2 Cir. 8/22/01), the Second Circuit Court of Appeal had to determine whether economic development could serve as a public purpose in the City of Shreveport's expropriation of property for a convention center prior to the 2006 Constitutional amendments. In that case, the court examined evidence in the form of witness testimony and at least two separate studies and reports from third parties to conclude that economic growth could be achieved through the creation of the convention center. *Id.* at 974.

Based on the information provided to this office, there does not appear to be any information submitted to the Commission that would allow the Commission to determine that economic development or growth would be achieved through the District's project. Such information might include third party studies or reports identifying: (1) the demand for commercial, retail, and/or residential properties proposed by the project, (2) the types of businesses or commercial activity that might be enhanced through the project, (3) the number of permanent and temporary jobs that would be created through the project, (4) the wages or salaries that would accompany these jobs, and (5) the amount of increased sales and property taxes that would be collected by the District or the Town. Economic development does not always provide an obvious direct public benefit, such as other public purposes like health care or education. Rather, the benefit received by the public from economic development is indirect and much less obvious than some other public purposes, although no less important. As economic development benefits private industry directly, and the general public in a less direct manner, a public entity must show some objective and reasonable information showing the economic impact a successful project would have.

It is the opinion of this office that some objective and reasonable information must be provided to the Commission that would allow the Commission to determine that economic development or growth would or could result from the proposed project to qualify as a public purpose under La. Const. art. VI, § 23. At this time, it does not appear that any such information has been provided to the Commission.

### 3. La. Const. art. VII, § 14 and Private Enterprise

In addition to La. Const. art. VI, § 23, this office has great concerns that the proposed activities of the District and the Town related to the proposed economic development project may constitute a use of public funds for a private enterprise in violation of La.

Const. art. VII, § 14. Specifically, La. Const. art. VII, § 14(A) provides, in part, as follows:

Except as otherwise provided in this Section, neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.

In *Public Housing Administration v. Housing Authority of City of Bogalusa*, 137 So.2d 315 (La. 1961), the Louisiana Supreme Court interpreted Article IV, § 12 of the 1921 Constitution, the source provision for the current La. Const. art. VII, § 14, as prohibiting the use of public funds for private enterprise. In that case, a state agency, through a contract for the purchase of certain insurance policies, sought to become a member of an insurance company. In affirming the Appellate Court's ruling, the Louisiana Supreme Court determined that Article IV, § 12 of the 1921 Constitution "clearly bans any participation by the State or its political subdivisions in the ownership and operation of a private enterprise." *Id.* at 532.

While the current La. Const. art. VII, § 14 does not contain the exact language found in the prior version of the Constitution, it is the opinion of this office that the prohibition on the use of public funds for a private enterprise contained in Article IV, § 12 of the 1921 Constitution remains in place under the current language of La. Const. art. VII, § 14. Accordingly, it is our opinion that the Louisiana Supreme Court's interpretation in *Public Housing Administration v. Housing Authority of City of Bogalusa* is applicable to La. Const. art. VII, § 14.

In addition, it is our opinion that the prohibition against the use of public funds for private enterprise extends beyond the simple acquisition of an ownership interest, through stock acquisition or otherwise, in a private business. Rather, we believe that the prohibition extends to prohibit the use of public funds for the carrying on and operation of a private enterprise, which is a function of the private sector and business community. To find otherwise would be to allow public entities to engage in the operation of a private enterprise, even though the public entity did not acquire an ownership interest in a currently existing private business. For example, a public entity would be allowed to use public funds to acquire and build a retail store, stock the store with consumer products, and hire public employees to run the store and compete directly with private retail stores such as Wal-Mart, simply because the public entity started the private enterprise from the ground up rather than purchasing an ownership interest in Wal-Mart. It is the opinion of this office that such a hypothetical cannot be used to circumvent the prohibitions against private enterprise contained in La. Const. art. VII, § 14. We conclude that La. Const. art. VII, § 14 also prohibits a public entity from spending public funds to engage in such a private enterprise.

In La. Atty. Gen. Op. No. 80-1082A, the Louisiana Stadium and Exposition District ("LSED") and HMC Management Corporation ("HMC") sought to enter into joint ventures with Hyatt Corporation, the parent company for HMC, for engaging in

promotional activities related to the Ali/Holmes boxing match. The promotional activities included contracting with other facilities, placing deposits with them; advertising through electronic and print media; traveling to each market, staffing expenses; contracting with ticket takers and ushers at each facility, and contracting for telephone lines to bring the broadcast to each facility. This office concluded that such an activity was a clear violation of La. Const. art. VII, § 14(A). The opinion cited *Public Housing Administration v. Housing Authority of City of Bogalusa* and the Louisiana Supreme Court's determination that the purchase of stock in a mutual insurance company was too speculative. The opinion stated, "it is axiomatic that if stocks on the New York Stock Exchange are too speculative, a promotion of a heavy-weight fight would be even more so." The opinion went on to conclude:

It is admitted that Ali/Holmes fight and attendant promotional activities are probably as close as one can come to a "a sure thing" in a business endeavor. However, the Constitution is the supreme law of Louisiana. To go against its clear mandate requires a constitutional amendment, not the judgment of a Board that this particular business opportunity is a good one.

In the instant matter, the District and the Town are seeking to use public tax revenues to purchase property, improve the property, and thereafter market and sell or lease the property for private commercial retail purposes as well as residential construction. Such activities, if allowed, would essentially result in the District or Town acting as commercial real estate developers and would put the District or Town in direct competition with private real estate development companies that traditionally are the private business sector parties that engage in such private enterprises. Private real estate developers invest their money, or that of their business partners, in the acquisition of property in order to develop it for sale or lease. That development may involve the construction of office buildings or apartments, or it may just involve preparing unimproved land for construction. If the venture is successful, the developer will make a profit, and if not, it will suffer a loss. The engagement in real estate development is an inherently speculative enterprise, as the outcome of a given project is not certain. Accordingly, it has traditionally been a private enterprise engaged in by the private business community. The District and the Town are now seeking to engage in this business in the name of furthering economic development within the Town. We do not believe that public funds are intended to be used in the risky and speculative business of real estate development in the name of economic development.

Accordingly, it is our opinion that proposed activities of the District and Town constitute the use of public funds for a private enterprise, which is prohibited by La. Const. art. VII, § 14.

4. La. Const. art. VII, § 14 and Prohibited Use of Public Funds

In addition to the prohibition against the use of public funds for private enterprise, it must also be determined whether the District's proposed project and transaction constitutes a prohibited loan or donation under La. Const. art. VII, § 14. La. Const. art. VII, § 14 is the constitutional provision relating to the prohibited donation, loan, or pledge of public funds. Specifically, La. Const. art. VII, § 14(A) provides:

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. Except as otherwise provided in this Section, neither the state nor a political subdivision shall subscribe to or purchase the stock of a corporation or association or for any private enterprise.

In *Board of Directors of the Industrial Development Board of the City of Gonzales v. All Taxpayers, Property Owners, Citizens of the City of Gonzales*, 05-2298 (La. 9/6/06); 938 So. 2d 11 ("*Cabela's*"), the Louisiana Supreme Court abandoned its prior analysis under La. Const. art. VII, § 14 and espoused a new standard by which matters must be analyzed under La. Const. art. VII, § 14. In light of the Louisiana Supreme Court's analysis in *Cabela's*, this office has consistently opined that in order for an expenditure of public funds to be permissible under La. Const. art. VII, § 14, the public entity must have the legal authority to make the expenditure and must show: (a) a public purpose for the expenditure that comports with the governmental purpose for which the public entity has legal authority to pursue; (b) that the expenditure or transfer is not gratuitous, and (c) that the public entity has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds. See, e.g. La. Atty. Gen. Op. No. 15-0073.

#### *A. Public Purpose*

As stated previously, the District claims that the public purpose for the acquisition of property and the expenditure of public funds for the project as a whole is economic development. Our analysis of public purpose stated previously in this opinion under La. Const. art. VI, § 23 also applies to the analysis of public purpose under La. Const. art. VII, § 14. As such, it is the opinion of this office that some additional objective information evidencing economic development must be provided to the Commission in order to satisfy the public purpose element.

#### *B. Gratuitous Nature*

One of the major focuses of the *Cabela's* court was whether the transaction in that case was gratuitous or not. In *Cabela's*, various entities of the City of Gonzales and the State of Louisiana made a decision to enter into several agreements with private parties to issue tax increment revenue bonds to effectuate a project resulting in a *Cabela's* Retail Center and a Sportsman Park Center. In furtherance of the project, a cooperative

endeavor agreement, trust indenture, lease agreement with option to purchase, and public facilities management agreement were entered into between numerous public and private entities, which included Cabela's Retail LA, LLC ("Cabela's"), Carlisle Resort, LLC ("Carlisle"), Louisiana Department of Revenue ("State"), Gonzales Economic Development District No. 1 ("EDD"), the City of Gonzales ("City"), and the Industrial Development Board of the City of Gonzales, Louisiana, Inc. ("Board"). Pursuant to these agreements, particularly the cooperative endeavor agreement, the court found that Cabela's will acquire property from Carlisle, construct and furnish a Cabela's retail store, and cooperate with Carlisle in development of other commercial ventures within the EDD. In order to finance the project, the Industrial Development Board would issue tax increment revenue bonds, which would be purchased by Cabela's and Carlisle on a pro-rata basis when needed to fund the construction. The debt service on the bonds was secured by 1.5% of the State sales tax collected within the EDD and 1.5% of the City sales tax collected within the EDD.

The *Cabela's* court, departing from prior jurisprudence on the matter, determined that a violation of La. Const. art. VII, § 14 occurred when a public entity gratuitously alienated public funds. In determining whether an alienation of public funds was gratuitous, the court focused on the reciprocal obligations of the public and private parties and the expectation of receiving value in exchange for the expenditure of public funds. The *Cabela's* court found that there was no gratuitous alienation of public funds, because of the "real and substantial obligations undertaken by Cabela's" in exchange for the public fund financing. In determining the obligations that Cabela's would undertake, the court examined the various agreements entered into between the public entities and Cabela's. The *Cabela's* court noted that the agreements provided numerous obligations on the part of Cabela's, including, but not limited to, the following:

1. Cabela's was required to provide the upfront financing through the purchase of the bonds;
2. Cabela's was obligated to ensure that the completed store had to remain in continuous operation for at least five years, and Cabela's was obligated to purchase materials and equipment from businesses within the City of Gonzales;
3. Cabela's was obligated to employ residents of the City of Gonzales;
4. Cabela's was obligated to employ at least 300 full and part-time workers in order to receive the public financing;
5. Cabela's was obligated to maintain the facilities at its expense.

In short, it was the legal obligations owed by Cabela's under the terms of the agreement that led the *Cabela's* court to determine that there was no gratuitous alienation of public funds and that the public entities would receive equivalent value in exchange for the use of public funds. The court even noted that the public entities stated, in the agreements, that the project will result in economic development and that the public entities had a reasonable expectation that they would receive benefits in excess of the public funds used. However, the court noted that those statements, standing alone, were insufficient to conclude that public funds were not gratuitously alienated. Rather, the court relied on

the provisions of the agreements with the private entities in determining that no violation of La. Const. art. VII, § 14 had occurred.

In the instant matter, the District and the Town wish to develop property with public funds for use by private businesses and persons. Unlike the development project in *Cabela's*, neither the District nor the Town has any agreements in place with any private developers that would allow a court to conclude that the District or the Town would not be in violation of La. Const. art. VII, § 14. No private developers exist in this transaction at this point, and thus, there is no objective evidence in the form of agreements that would establish the non-gratuitous nature of the use of public funds. While representatives from District and the Town have asserted that they will receive at least the amount of public funds expended on the project, the *Cabela's* court plainly stated that such statements, standing alone, are insufficient to establish non-gratuitous intent or equivalent value. There must be some objective evidence, in the form of agreements with the private developers that will receive the benefits of the public funds, which will objectively demonstrate the non-gratuitous intent of the District and the Town.

Accordingly, it is the opinion of this office that, without agreements in place with private developers establishing the non-gratuitous nature of the expenditure of public funds, as required by the *Cabela's* court, the District's proposed project and related transaction fail to satisfy the second element of the *Cabela's* test.

### *C. Equivalent Value*

In addition to the non-gratuitous nature of the transaction, this office has also stated that a public entity must have a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure of public funds. La. Atty. Gen. Op. No. 15-0073. Indeed, in your request, you specifically ask how this particular element of the *Cabela's* test can be legally satisfied. Generally, whether a public entity has a demonstrable, objective, and reasonable expectation of receiving equivalent value is a factual determination, and thus, there is no bright line test that can be applied to this element. However, considering the *Cabela's* court's heavy reliance on agreements between the public entities and private developers in determining that no violation of La. Const. art. VII, § 14 had occurred, it is our belief that the District must be able to establish its demonstrative, objective, and reasonable expectation of equivalent value with agreements with private developers.

As noted in this opinion, there are currently no agreements in place with any private developers, which would establish an objective and reasonable expectation of receiving equivalent value in exchange for the expenditure of the public funds here. The District hopes to eventually to sell or lease property to private developers after the District has expended public funds to develop the property. The potential private developers are the parties that will receive the benefit of the use of public funds, and therefore, there must be some evidence, in the form of agreements with those private developers, that will substantiate the District's demonstrable, objective and reasonable expectation of

receiving equivalent value. The only information provided by the District resembling an agreement with a private developer is in the form of letters of interest, which are simply not sufficient to establish equivalent value at this point. There is nothing to suggest that any private developer or any other private party would be willing to purchase, lease, or otherwise use this property at any price, much less in an amount sufficient to establish equivalent value.

This conclusion is in line with La. Atty. Gen. Op. No. 77-1328. In that opinion, the Webster Parish Police Jury sought to use general fund money to purchase and develop real estate and construct building facilities to induce industry into the parish; however, at the time the funds were to be expended, there were no parties legally bound to reimburse the police jury for such an outlay of public funds. At the time of the opinion, the industrial inducement laws did not specifically allow such an expenditure. This office concluded that since the police jury would have no legally assured expectation of reimbursement for such an expenditure, the proposed expenditure of public funds violated La. Const. art. VII, § 14.

Without evidence of the obligations to be incurred by the private developers receiving the benefit of the public funds in the form of agreements with those private developers, it is our belief that the project and transaction proposed by the District violates La. Const. art. VII, § 14 under the *Cabela's* analysis. Without agreements in place, there is insufficient evidence for this office to conclude that the transaction is not gratuitous under the *Cabela's* analysis or that the District has a demonstrable, objective, and reasonable expectation of receiving equivalent value for the use of public funds. However, we do believe that an analysis under *Cabela's* might be satisfied if agreements are entered into with private developers establishing sufficient obligations of the private developers.

As we have determined that, based on the information provided to this office, the District's proposed project and related transaction is prohibited pursuant to La. Const. art. VI, § 23 or La. Const. art. VII, § 14, your remaining questions appear to be unnecessary.

Considering the foregoing, it is the opinion of this office that the proposed transaction and activities of the District and Town in furtherance of the proposed economic development project constitute a use of public funds for a private enterprise in violation of La. Const. art. VII, § 14. It is further the opinion of this office that the District's proposed project and related transaction does not satisfy the public purpose requirements of La. Const. art. VI, § 23 and La. Const. art. VII, § 14.<sup>2</sup> There is insufficient evidence to establish that economic development or growth will result from

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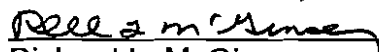
<sup>2</sup> We must note that this conclusion is only intended to be applicable to the specific project or application of the District and the Town, and it is not intended to act as a prohibition to other valid economic development projects or to industrial parks and plant sites created pursuant to La. R.S. 33:130.51, *et seq.* and La. Const. art. VI, § 21.

the District's proposed project, and therefore, the transaction fails the public purpose requirement of La. Const. art. VI, § 23 and La. Const. art. VII, § 14. Additionally, without agreements in place with private developers, it is further our opinion that the District's proposed project fails the second and third legal elements of the *Cabela's* analysis, and thus, violates La. Const. art. VII, § 14.

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:   
Richard L. McGimsey  
Assistant Attorney General

JDC/