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ATTORNEY GENERAL OF TEXAS

July 15, 2019

The Honorable Garnet Coleman
Chair, Committee on County Affairs
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0261

Re: Whether durational or amount limitations exist for loans and grants issued for economic development programs pursuant to subsection 381.004(h) of the Local Government Code (RQ-0266-KP)

Dear Representative Coleman:

You ask for clarification on a statute that concerns a commissioners court's authority to stimulate business and commercial activity in a county.¹ Subsection 381.004(b) of the Local Government Code authorizes a commissioners court to develop and administer various programs to stimulate business and commercial activity, including for purposes of "state or local economic development" and "to stimulate, encourage, and develop business location and commercial activity in the county." TEX. LOC. GOV'T CODE § 381.004(b)(1), (3). A program authorized by subsection 381.004(b) may provide for tax abatement agreements with property owners. *See id.* § 381.004(g). A program for such purposes may also include "making loans and grants of public money and providing personnel and services of the county." *Id.* § 381.004(h). Your question concerns a restriction in the provision authorizing programs for tax abatement agreements that does not appear in the provision authorizing loan and grant programs. Request Letter at 4. Specifically, subsection 381.004(g) states that the "execution, duration, and other terms" of a tax abatement agreement "are governed, to the extent practicable, by the provisions of Sections 312.204, 312.205, and 312.211, Tax Code, as if the commissioners court were a governing body of a municipality." TEX. LOC. GOV'T CODE § 381.004(g); *see also* TEX. TAX CODE §§ 312.204 (generally limiting municipal tax abatement agreements to a 10-year period), 312.205 (specifying terms of municipal tax abatement agreements), 312.211 (limiting certain municipal tax abatement agreements to a 4-year period and limiting the exemption amount available during each year of the agreement). You tell us that Texas counties are currently receiving applications for loans and grants under subsection 381.004(h) that exceed a ten-year period. *See* Request Letter at 1. You ask whether the ten-year period applicable to tax abatement agreement programs in subsection 381.004(g) applies to loan and grant agreements under subsection 381.004(h) and, if not, whether other constitutional or

¹*See* Letter from Honorable Garnet Coleman, Chair, House Comm. on Cty. Affairs, to Honorable Ken Paxton, Tex. Att'y Gen. at 1, 4 (Jan. 9, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

statutory limitations apply, particularly on the duration or amount of a loan or grant agreement. *Id.* at 4.

When construing a statute, a court's primary goal is to give effect to the Legislature's intent. *Gunn v. McCoy*, 554 S.W.3d 645, 672 (Tex. 2018). Courts determine legislative intent "as a matter of law using well-established interpretive principles to construe the statutory language." *In re Xerox Corp.*, 555 S.W.3d 518, 522 (Tex. 2018). One such principle is that "[w]hen the Legislature expresses its intent regarding a subject in one setting, but . . . remains silent on that subject in another, [a court] generally abide[s] by the rule that such silence is intentional." *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013) (construing the Legislature's express provision for reevaluating temporary income benefits but not permanent income benefits as "a deliberate choice" of the Legislature that courts must respect). Here, the Legislature expressly limited "the execution, duration, and other terms" of tax abatement agreements entered into pursuant to subsection 381.004(g) by requiring compliance with specified Tax Code provisions, but did not limit the making of loans and grants under subsection 381.004(h) in the same way. TEX. LOC. GOV'T CODE § 381.004(g), (h). Therefore, the limitations stated in subsection 381.004(g), including the ten-year durational limitation, do not apply to loans and grants made under the authorization granted in subsection 381.004(h).

To determine whether other limitations may nonetheless apply, we examine a county's general spending authority. A county's expenditure of public funds implicates article III, subsection 52(a) of the Texas Constitution, which limits the Legislature's power to authorize a county "to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." TEX. CONST. art. III, § 52(a); *see also id.* art. XI, § 3 (generally prohibiting a county from loaning its credit). The purpose of this provision is to prevent the gratuitous grant of public funds for private purposes. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995). However, the expenditure of public funds for a public purpose that provides a clear public benefit in return is not an unconstitutional grant of public funds. *See Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). The Texas Supreme Court provides a three-part test to determine whether an expenditure of public funds satisfies article III, subsection 52(a): (1) the expenditure's predominant purpose must be to accomplish a public purpose of the public entity, not to benefit private parties; (2) the public entity must retain sufficient control over the expenditure to ensure that the public purpose is accomplished; and (3) the public entity must receive a return benefit. *See id.* at 384.

The first prong of this test requires a public purpose. Another article III provision—section 52-a—establishes economic development as a public purpose and specifically authorizes the Legislature to "provide for the creation of programs and the making of loans and grants of public money" to further that purpose. TEX. CONST. art. III, § 52-a. A loan or grant of public money made pursuant to subsection 381.004(h) for an economic development program authorized by

subsection 381.004(b) thus serves a public purpose and satisfies the first prong of the Court's test for compliance with article III, subsection 52(a).²

In addition to the public-purpose requirement, a loan or grant of public money for economic development made by a county pursuant to subsection 381.004(h) must also satisfy the other two prongs of the *Texas Municipal League* test for compliance with article III, subsection 52(a)—sufficient controls to ensure the accomplishment of a public purpose and receipt of a return benefit. *See Tex. Mun. League Intergov'tl Risk Pool*, 74 S.W.3d at 384; *see also* Tex. Att'y Gen. Op. No. JM-1255 (1990) at 8–9 (noting “there is no language in either section 52-a or in the relevant commentary to suggest that the amendment was intended to change the requirements . . . of a public purpose and that transactions using such resources and powers contain sufficient controls to insure that the public purpose be carried out”). The commissioners court must determine in the first instance, subject to judicial review, whether an expenditure meets these additional requirements. Tex. Att'y Gen. Op. No. KP-0116 (2016) at 5.

A county's spending authority also implicates section 7 of article XI of the Texas Constitution, which prohibits a county from incurring a “debt” without establishing a tax to cover interest on the obligation and create a sinking fund of at least 2% to reduce the principal. *See* TEX. CONST. art. XI, § 7. A “debt” for constitutional purposes means any contractual pecuniary obligation except that which was within the lawful and reasonable contemplation of the parties, at the time of the agreement, “to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the county.” *Tex. & New Orleans R.R. v. Galveston Cty.*, 169 S.W.2d 713, 715 (Tex. 1943). However, article III, section 52-a, the enabling provision for economic development loans and grants made through subsection 381.004(h), specifies that a loan or grant made “as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt” for constitutional purposes. TEX. CONST. art. III, § 52-a (also providing that if a political subdivision does issue bonds or other obligations payable from ad valorem taxes, it must gain voter approval). Thus, depending on the circumstances, section 7 of article XI may impact how a particular loan or grant program is structured by a county utilizing subsection 381.004(h) for economic development.³

²Prior to certain statutory amendments, this office concluded that section 381.004 of the Local Government Code was not intended to implement the constitutional provisions in article III, section 52-a, citing the omission of specific authority in section 381.004 at that time to make county economic development loans and grants and noting no reference to article III, section 52-a in the statute or its legislative history. *See* Tex. Att'y Gen. Op. No. JC-0092 (1999) at 7–13. However, the Legislature amended section 381.004 in 2001 to expressly authorize counties to make grants and loans of public money in connection with a program to stimulate business and commercial activity in a county, which includes grants and loans for local economic development, in what is now subpart (h) of section 381.004. *See* Act of May 25, 2001, 77th Leg., R.S., ch. 1154, § 1, 2001 Tex. Gen. Laws 2560, 2560 (amended 2003) (current version at TEX. LOC. GOV'T CODE § 381.004(h)). In addition, one appellate court recently determined that to invoke article III, section 52-a, the enabling legislation of a statute need not “expressly refer to section 52-a as long as it is clear that the legislature created the program with the intent to encourage economic development.” *Ex parte City of Irving*, 343 S.W.3d 850, 855 (Tex. App.—Dallas 2011, pet. granted, judgment vacated w.r.m.). Accordingly, Attorney General Opinion JC-0092 (1999) is superseded by statute.

³This opinion should not be read to construe section 381.004 as independently authorizing the issuance of debt.

Regarding your specific concern about loans and grants made for economic development under subsection 381.004(h), neither that statute nor the state constitutional provisions at issue impose durational or amount restrictions. As the administrative head of county government, a commissioners court has broad discretion to conduct county business and broad implied powers to accomplish its legitimate directives. *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 863 (Tex. 1993); *see also* TEX. CONST. art. V, § 18(b) (providing that a commissioners court “shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State”). In fulfilling its statutory authority to approve and authorize a budget, the commissioners court oversees the fiscal operation of the county, which carries with it “the essence of the decision making entrusted to [its] judgment” as the commissioners court apportions funds among the various operations and programs of the county. *Griffin v. Birkman*, 266 S.W.3d 189, 195 (Tex. App.—Austin 2008, pet. denied); *see also* TEX. LOC. GOV’T CODE §§ 111.001–.075. Subsection 381.004(h) thus leaves the duration and amount of economic development loans and grants to the commissioners court’s budgetary discretion in the first instance, subject to the constitutional limitations discussed herein.

S U M M A R Y

With respect to specified programs authorized by section 381.004 of the Local Government Code for stimulating business and commercial activity in a county, the limitations on tax abatement agreements stated in subsection 381.004(g) do not apply to loans and grants made pursuant to subsection 381.004(h).

Loan and grants authorized by subsection 381.004(h) must comply with sections 52(a) and 52-a of article III of the Texas Constitution. Section 7 of article XI of the Texas Constitution may also impact how such loans and grants are structured, depending on the circumstances.

Subject to these constitutional limitations, subsection 381.004(h) leaves the duration and amount of economic development loans and grants to the commissioners court's budgetary discretion in the first instance.

Very truly yours,



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