

County of Jim Wells

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OCT 06 2006

OPINION COMMITTEE



JESUSA SANCHEZ-VERA
COUNTY ATTORNEY

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200 NORTH ALMOND
P. O. DRAWER 2080
ALICE, TEXAS 78333

October 3, 2006

The Honorable Greg Abbott
Attorney General for the State of Texas
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

CMRRR#7005 3110 0003 1316 2946

FILE # AL-45014-06
I.D. # 045021

RE: Request for Attorney General Opinion - City of Alice Loan
To Private Developer

RQ-0535-GA

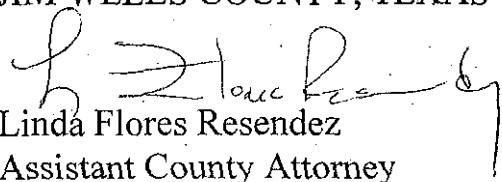
Dear Attorney General Abbott:

On or about September 25, 2006, this office sent a memorandum consisting of issues, discussion and legal authorities in support of the request for an opinion. As we did not forward the request for an opinion with a transmittal letter, please consider this a transmittal letter of the request.

This office was presented with a question concerning the validity of an action taken by the City Council of the City of Alice with respect to the expenditure of public funds. Pursuant to Government Code Section 402.043, it is our belief that such issue is one of interest to the state and general public and thus we present the same to your office for consideration to assist us in our investigation of such a question.

Very truly yours,

COUNTY ATTORNEY
JIM WELLS COUNTY, TEXAS


Linda Flores Resendez
Assistant County Attorney

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REQUEST FOR ATTORNEY GENERAL OPINION

SEP 28 2006

September 25, 2006

OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General for the State of Texas
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

CMRRR # Z 380 442 319

FILE # ML-45014-06

I.D. # 45014

RE: Request for Attorney General Opinion – City of Alice Loan to Private Developer

Dear Attorney General Abbott:

RQ-0535-GA

We have been asked to request an opinion from your office regarding an action taken by the City Council of the City of Alice, Texas approving a commitment for a loan to a private developer for a private housing project specifically requesting if the City of Alice's action by vote of the City Council was valid under the Texas Constitution, Texas Local Government Code Section 380.001 *et seq.*, the ordinance adopted under such statutory provision and the City Charter.

Background.

The City of Alice is a home-rule city with a population of approximately 20,000 ("City" or "City of Alice"). Pursuant to Texas Local Government Code Section 380.001 *et seq.*, the City of Alice adopted an ordinance in November 2003 establishing an Alice Economic Development Program ("Program"). In the preamble of the ordinance the City cited Section 380.001 as the authority enabling the establishment and development of an economic program for the City. Further, the preamble provides:

" . . . promotion and stimulation of economic development and business activity and commercial activity promotes the welfare and best interests of the City."

The ordinance specifically provided that the Program would be managed by City Council for the purpose of:

" . . . promoting economic development and to stimulate business and commercial activity in the City of Alice".

The ordinance authorized the City to loan, grant money and expend funds associated with the administration and the operation of the Program. The ordinance further required that grants and

loans should be made with “. . . *related controls and standards of accountability to ensure compliance with the use of such monies in accordance with the purposes of the Program.*” Also, the ordinance required safeguards with respect to grants and loans, measurements, right of reimbursements, reports and other accounting requirements to ensure that the grants and loans are used in accordance with the purposes under the Program.

The ordinance is attached as Exhibit “1”.

Though the ordinance provided that the City Council would administer the Program, the City delegated the task of implementation and operation of the Program to the Community Development Department of the City of Alice; however, the Program has been essentially dormant except for one (1) grant of monies which occurred in 2003.

In 2003, a private foundation donated the sum of \$20,000.00 to the City under the Program for the specific purpose of making improvements to the Alice Chamber of Commerce. An ordinance was adopted in November 2003 accepting the donation providing that:

“. . . the improvements to the Alice Chamber of Commerce’s physical facility will promote economic development, business activity and any commercial activity which promotes the welfare and best interests of the City.”

The ordinance authorized the receipt of the money with the specific purpose that the money be used for the construction of capital improvements to the Alice Chamber of Commerce’s physical facility (“Chamber”).

A copy of the ordinance is attached as Exhibit “2”.

Pursuant to such ordinance, an agreement was entered into with the Chamber reciting that:

“. . . the construction of improvements to the Chamber’s facility enhances its ability to promote and develop economic growth and development . . .”

The agreement contained specific provisions requiring the development of plans and specifications for the improvements by an engineer. It required that the construction of improvements be made pursuant to bids and that the award be made to the lowest responsible

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bidder. Further, the agreement provided that the total amount allocated for such improvements would be \$20,000.00 and that payments would be made at such times as approved by the City and the contractor.

A copy of the agreement is attached as Exhibit "3".

The City has made no other grants and loans under its Economic Development Program since November 2003.

In July 2006, a private developer requested the City grant a loan in the amount of \$168,048.00 styled as a "*predevelopment loan*" for a privately owned housing project. The summary of the loan furnished by the private developer specifically provided that the funds were to be used to pay for predevelopment costs such as land acquisition and certain architectural and engineering fees associated with the development of the project.

A copy of the Summary of the Predevelopment Loan is attached as Exhibit "4".

The City held its meeting on July 24, 2006 and during the consideration of the request for the loan, it was represented by city staff that the City Council was required to act at such meeting because of time constraints that the private developer had to meet in order to qualify for certain low income housing tax credits through the Texas Department of Housing and Community Affairs. The Council was divided in its review and assessment at such meeting. It was mentioned by a Council member that the City was desirous of housing, another City Council member mentioned that they had not been given sufficient time and sufficient information to make an informed decision. A vote on the request was taken. The vote was split, and the Mayor broke the tie voting in favor of the grant of the commitment for the loan.

The commitment for the loan was then changed to reflect the purpose was for an economic development loan. The loan states the proceeds of the loan will be utilized to pay for predevelopment costs associated with the development of the project. Further, that the loan was made pursuant to Section 380.001 of the Tex. Loc. Gov't. Code and the Alice Code of Ordinance Number 1745.

There was no ordinance adopted by the City Council that formalized the approval of the commitment for the loan, the purpose, the terms of repayment, safeguards or provisions regarding default as required by the City Charter. Other than the loan, there was no agreement entered into with the private developer formalizing the purpose, the terms of repayment,

safeguards or provisions regarding default in accordance with the requirements of the City's ordinance.

The predevelopment loan with the changes is attached as Exhibit "5".

Discussion of Legal Authority.

It is well established law that a city is prohibited from lending its credit for private purposes. Texas Constitution Article III, Section 52(a). A municipality is not permitted to provide its funds or property for private purposes.

It is also well established law that the Texas Constitution envisioned the use of public funds for economic development. Article III, Section 52-a of the Texas Constitution provides that the legislature may provide for use of government funds for economic development so long as the economic development is for a public purpose and such public purposes are defined as follows:

1. Development and diversification of economy of the state;
2. Elimination of unemployment or underemployment in the state;
3. Stimulation of agricultural innovation;
4. Posturing of the growth of enterprises based on the agriculture; or
5. The development or expansion of transportation or commerce in the state.

Such provision also provides that bonds or "*other obligations*" of a municipality that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the municipality. If the program loan or grant is not secured by a pledge of ad valorem taxes, then such does not create a debt for the purposes of this provision.

Based on such constitutional provision allowing monies for economic development, the Texas Legislature enacted Texas Local Government Code Section 380.001 *et seq.* to enable a municipality to establish a program promoting and furthering economic and business development and more specifically:

" . . . making loans and grants of public money and providing personnel and services of the municipality to promote state or local economic

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development and to stimulate business and commercial activity in the municipality.”

The Attorney General has interpreted Tex. Loc. Gov't. Code Section 380.001 (“Section 380.001”) in Opinion Number DM-185 (1992). The Attorney General opined on page 3 that the Texas Const. Article III, Section 52-a, does not:

“ . . . by itself expand a municipality’s authority to lend credit, but it authorizes the legislature to enact laws to do so.”

In such regard, Section 380.001 *et seq.* constitutes the enabling legislation under Tex. Const. Article III, Section 52-a allowing for such authority. Such opinion states that a municipality may institute a program to promote state or local economic development; however, it must determine that it is using public funds and resources for the direct accomplishment of a public purpose and that the transactions using the public funds contain sufficient controls to ensure that the public purpose is carried out. Further, a municipality must comply with the constitutional requirement that if the loan or grant or other obligation funding such loan or grant are payable out of ad valorem taxes, such must be subject to referendum.

Please note that both Tex. Const. Art. III, Sec. 52-a and the Tex. Loc. Gov't. Code Sec. 380.001 *et seq.* discussed above make no reference to housing. References to housing are clearly excluded from such provisions. All such references under such constitutional and statutory provisions specifically deal with economic development, unemployment, underemployment, agricultural development, transportation and commerce. Further, Sec.380.001 specifically addresses promotion of local economic development and stimulation of business and commercial activity without specific reference to housing. See Attorney General Opinion Number JG-0092 (1999) wherein it was stated:

“It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose.”

See also Texas Attorney General Opinion Number JM-1227 (1990). It is clear that the omission of housing from Tex. Const. Art. III, Sec. 52-a and Tex. Loc. Gov't. Code Sec. 380.001 *et seq.* does not authorize loans for housing as a specific purpose under such authority. See also, *Laidlaw Waste Sys., Inc. v. City of Wilmer*, 904 S.W.2d 656 (Tex. 1995) and *Jones v. Houston*

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Gen. Ins. Co., 736 S.W.2d 860 (Tex. App. – Waco no writ). The Court in *Jones v. Houston Gen. Ins. Co.* stated:

“The existence or non-existence of legislative intent may be inferred from the fact a certain provision is missing from a statute.”

See also, Tex. Gov’t Code Sec. 312.005 which requires that the entire act as a whole must be read to determine the intent of the Legislature. Section 380.001 authorizes “*grants and loans*” for economic development and to stimulate business and commercial activity under the provision allowing for loans and grants of public monies. Section 380.002 authorizes home-rule cities with a population of more than 100,000 to create programs for “*grants*” to organizations with a 501 (c)(3) exempt status under IRS and to development corporations created by cities under Tex. Rev. Civ. Stat. Ann. Art. 5190.0 for public purposes identified as development and diversification of the economy, elimination of unemployment and underemployment and the development or expansion of commerce. It appears that grants for housing may be allowed by home-rule cities with a population of more than 100,000 to the specified entities by the statute; however, in this case the City’s population is under 100,000 and the City extended its credit for a commitment for a loan, not a grant. Further, it could be argued that housing serves to support economic development as one of the purposes under the City of Alice’s Program; however, such should have been established under its policies, procedures, criteria. Such was not done in this case.

City of Alice Charter, Ordinance, Policies and Action.

As discussed herein, the City of Alice acted on a motion to approve the lending of its credit as a commitment for a loan to a private developer for a housing project to be owned privately for the purpose of a predevelopment loan which was later changed to public purpose.

Aside from the one grant of monies which the City made in 2003, the City has not engaged in either a loan or any other grant of monies for any purpose since the year 2003 until this incidence when the request was made for a loan by a private developer.

The City does not have any policies or procedures within its Program that establishes criteria regarding the following:

1. A budget under which the Program operates, the source of funds for such budget, and how funds are allocated for grants and/or loans, business, agriculture, etc.;
2. Purposes and permitted uses of City funds for grants and/or loans;
3. Businesses or entities that qualify under the Program such as economic development corporations created under Tex. Rev. Civ. Stat. Ann. Art. 5190.6, housing authorities creating under Tex. Loc. Gov't. Code and/or non-profit entities that engage in promotion of economic development;
4. Whether grants and/or loans will be authorized;
5. Types of businesses that qualify as an economic program for a grant and/or loan of monies such as industries, manufacturing, agricultural enterprises, oil or gas industries and/or housing that serves such needs;
6. The nature and purpose of a grant and/or loan authorized to be made under the program such as capital improvement, infrastructure, inventory, equipment, tools or marketing;
7. Requirements regarding disclosure of financial structure of the business or entity seeking grant and/or loan of monies to enable the City to determine the creditworthiness of the applicant, the ability to perform under the obligations that promote economic development;
8. Requirements for results to ensure that the grant and/or loan of monies are used for the purpose of the grant and/or loan;
9. The manner in which the economy is bolstered, such as the creation of jobs undertaken by the business or entity, the use of local businesses in its relationships and/or development of new businesses as a result of the loan;
10. How the loan and/or grant of monies will serve to expand the tax base;

11. Requirement of an agreement setting out all the obligations of the business receiving the grant and/or loan, including default provisions enabling the City to recoup any losses suffered as a result of the failure of the business or entity to perform in accordance with the requirements under the program.

In this case, the City has an ordinance and has represented that the Community and Development Department of the City of Alice administers the Program; however, the City has not engaged in any activity other than the one (1) grant of monies which the City received as the result of a donation which it utilized for improving the structure of the Chamber of Commerce in 2003. Since that time no other activity has occurred under the Program other than what appears to be a random grant of the City's credit based upon a request by a private development in July 2006 which is the subject of this request for an opinion. There was no budget identified for this Program which reflected the specific commercial and economic endeavors promoted by the Program. When the City considered the request for the loan by the private developer in July 2006, there was no reference or representation of the source of City funds to be utilized for purposes of the loan. It is possible that revenues from ad valorem taxes could be utilized for this project and if so, this is an issue that should have been presented as a referendum to the voters of the City for approval or disapproval.

The City has no record that it ever held hearings to obtain input from its citizens regarding this Program, the establishment of a budget for such Program, the purposes of the Program with reference to economic development, the types of economic activities that promote public purposes and the best interests of the City and specifically the promotion of stimulation of business and commercial activity in the City. There is no record established by the City that reflects what activities, ventures and/or businesses serve a public purpose and provide economic and business development. If the City determined that housing stimulates business and commercial activity, such should have been established by public hearings with specific findings that the housing stimulates business and commercial activity and impacts the economy, such as the proposed tax base expansion, the jobs to be solicited from the City. In the case of the loan commitment made the subject of this request for an opinion, there was no reference or specific finding that this private developer would create jobs or expand the tax base or foster any other economic development.

The City acting randomly essentially granted its credit by extending a commitment for a loan to a private developer under a broad grant with no pre-existing criteria, no pre-existing guidelines, no pre-existing qualifications, no pre-existing budget, no determination as to the

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allocation of funds to enable such commitment, the sources of such funds and all to the exclusion of other businesses and public housing entities who could and should have been considered in such grant of the City's credit and monies.

The City should have developed its economic development program with the establishment of a plan that the City determined served a public purpose and financing, grants and loans in keeping with such purpose.

Further, the City, in taking action at a meeting without the adoption of an ordinance, does not constitute a valid commitment for a loan. The City was required to adopt an ordinance authorizing such commitment for loan. Sections 30 and 31 of the Charter of the City of Alice. The Charter requires that:

"... every act of the council . . . providing for the expenditure of funds or for the contracting of indebtedness shall be by ordinance." (Section 30)

Further, the ordinance should have been published as such is required by Section 31.

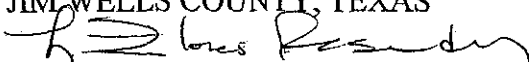
Sections 30 and 31 of the Charter of the City of Alice are attached as Exhibit "6".

The City's purported action also appears to be an obligation of the City that would have required a referendum as there was no specific finding prior to or during such action taken by the City Council on July 24, 2006 regarding the establishment of a budget and the source of funds for the budget.

Finally, Section 380.001 *et seq.* of the Local Government Code does not specifically authorize housing as housing was specifically excluded and being specifically excluded, such purported action by the City was without authority unless it had specific findings that housing of this nature which is owned by a private developer serves a public purpose and such activities promote economic and business activities.

Very truly yours,

COUNTY ATTORNEY
JIM WELLS COUNTY, TEXAS


Linda Flores-Resendez, Assistant County Attorney