# Economic Development -- Municipalities

**Number:** INFORMAL

**Date:** June 20, 2014

Mr. Donald R. Curtis, III
Attorney for the City of Perry
Post Office Drawer 579
Perry, Florida 32348

Dear Mr. Curtis:

You have asked for this office's assistance in determining whether the City of Perry may guarantee a loan, either through the Taylor County Development Authority or directly for the benefit of a private entity, as an economic development incentive.

In sum, while section 166.021(8), Florida Statutes, assigns a public purpose to the expenditure of funds to attract and retain business enterprises, in order to rely upon the statute's provisions, the city must make the legislative determination that such an expenditure through a loan guarantee serves a municipal purpose. Such determination is for the legislative body of the city and may not be made by this office.

You state that the Taylor County Development Authority is advocating on behalf of a private company which is contemplating locating a fertilizer manufacturing plant in the county. While you relay that the private company has a loan commitment through the issuance of municipal tax-free bonds for the construction of the plant, it seeks assistance from the county development authority to obtain a line of credit to finance pre-construction engineering, site examination, and environmental audit costs which will be repaid once the construction phase is fully funded by the purchase of the bonds. The city has been approached to guarantee the loan on behalf of the Taylor County Development Authority. In the alternative, the private company has been advised that it could obtain a loan directly from the bank if the city itself will guarantee the loan.

Section 10, Article VII, Florida Constitution, states in part that "[n]either the state nor any county, school district, municipality, special district, or agency of any of them, shall . . . give, lend or use its taxing power or credit to aid any corporation, association, partnership or person[.]"[1] The Supreme Court of Florida has stated that the "purpose of [this provision] is 'to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited.'"[2]

This office has previously addressed a similar inquiry regarding a potential conflict between section 10, Article VII, Florida Constitution, and section 166.021(9)(e), Florida Statutes.[3] In that informal opinion, it was initially noted that this office must presume the validity of a duly enacted statute until a court of competent jurisdiction declares otherwise.[4] The opinion further discussed the constitutional prohibition against a public entity lending its credit to a private person or corporation, citing to case law determining that the lending of credit "implies the imposition of some new financial liability upon the State or a political subdivision which in effect

results in the creation of a State or political subdivision debt for the benefit of private enterprises."5 As cited therein, the Supreme Court of Florida has defined "lending of credit" as:

"[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit."[6]

The Court has also explained that "[i]n order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody."[7]

Section 166.021, Florida Statutes, in pertinent part provides that "[t]he governing body of a municipality may expend public funds to attract and retain business enterprises, and the use of public funds toward the achievement of such economic development goals constitutes a public purpose."[8] The section expresses the Legislature's determination that "there is a need to enhance and expand economic activity *in the municipalities* of this state. . ." and "declares that it is necessary and in the public interest to facilitate the growth and creation of business enterprises *in the municipalities* of the state."[9] (e.s.) The statute further states:

"[I]t constitutes a public purpose to expend public funds for economic development activities, including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community."[10]

In requiring that municipalities with revenues or expenditures in excess of $250,000.00 file annual reports of economic development incentives in excess of $25,000.00, the Legislature has defined "economic development incentives" to include:

"a. Direct financial incentives of monetary assistance provided to a business from the municipality or through an organization authorized by the municipality. Such incentives include, but are not limited to, grants, loans, equity investments, *loan insurance and guarantees*, and training subsidies.
b. Indirect incentives in the form of grants and loans provided to businesses and community organizations that provide support to businesses or promote business investment or development.
c. Fee-based or tax-based incentives, including, but not limited to, credits, refunds, exemptions, and property tax abatement or assessment reductions.
d. Below-market rate leases or deeds for real property." (e.s.)

In this instance, it appears that the Legislature has assigned a public purpose to the expenditure of public funds for certain economic development activities. Moreover, in defining "economic development incentives" to include loan insurance and guarantees, the Legislature appears to implicitly recognize that a municipality would be authorized to use public funds to guarantee a loan as a means to facilitate economic development activities. As noted above, this determination must be presumed valid and should be given great weight.[11]

While the plain language of section 166.021(8), Florida Statutes, grants authority to a municipality to expend public funds to attract and retain business enterprises and recognizes that such expenditures serve a public purpose, the city must also make the legislative determination that the expenditure of municipal funds serves a municipal purpose.[12] Thus, while the Legislature has determined that the expenditure of public funds for economic development activity serves a *public* purpose, in order to avail itself of the provisions in section 166.021(8), Florida Statutes, a municipality must also make the legislative determination that the expenditure of its funds, directly or through the guarantee of a loan, will serve a *municipal* purpose.[13]

Accordingly, it would appear that section 166.021, Florida Statutes, authorizes a city to provide a loan guarantee as an economic development incentive directly or through an organization authorized by the municipality, if the city makes the appropriate legislative determination that the arrangement serves a valid municipal purpose.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 8 So. 3d 1076, 1097 (Fla. 2008) ("As we have defined credit and the lending of credit, the constitutional prohibition contemplates not just the use of public funds but the imposition of a new financial liability and a direct or indirect obligation to pay a debt of a third party."); *Nohrr v. Brevard County Education Facilities Authority*, 247 So. 2d 304, 309 (Fla. 1971) ("'[C]redit' as used in Fla. Const., art. VII, s. 10 (1968), implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.").

[2] *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 885 (Fla. 1980) (quoting *Bannon v. Port of Palm Beach Dist.*, 246 So. 2d 737, 741 (Fla. 1971)).

[3] Informal Opinion to Mr. Robert K. Robinson, North Port City Attorney, dated March 23, 2011.

[4] *See Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F.Supp.2d 691 (M.D. Fla. 2007), *question certified*, 508 F.3d 653 (11th Cir. 2007), *certified question answered*, 8 So. 3d 1076, 1095 (Fla. 2008), *answer to certified question conformed to*, 562 F.3d 1166 (11th Cir. 2009).

[5] *See Nohrr, supra* at 309.

[6] *State v. Housing Finance Authority of Polk County*, 376 So. 2d 1158, 1160 (Fla. 1979) (citing *Nohrr*, 247 So. 2d 304).

[7] *Nohrr*, 247 So. 2d at 309.

[8] Section 166.021(8)(b), Fla. Stat.

[9] Section 166.021(8)(a), Fla. Stat.

[10] Section 166.021(8)(c), Fla. Stat.

[11] *See State v. Housing Finance Authority of Polk County*, 376 So. 2d 1158, 1160 (Fla. 1979).

[12] *See, e.g.,* Op. Att'y Gen. Fla. 94-53 (1994) (city may make industrial and economic development grants to privately owned businesses if it makes the appropriate legislative determination that such grants serve a municipal purpose).

[13] *See* s. 166.021(1), Fla. Stat. (municipalities may exercise any power for municipal purposes, except when expressly prohibited by law), *and see, e.g., State v. Housing Finance Authority of Polk County*, 376 So. 2d 1158, 1160 (Fla. 1979). *See also* Ops. Att'y Gen. Fla. 88-51 (1988), 86-87 (1986), 84-76 (1984), and 83-05 (1983) (legislative determination and findings as to the purpose and the benefits accruing to the county from the program could not be delegated to the Attorney General, nor could the Attorney General undertake to make such legislative findings on behalf of the county).