



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

July 7, 1997

The Honorable Warren Chisum
Chair, Committee on Environmental Regulation
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 97-061

Re: Whether the Pampa Economic Development Corporation may contribute to a Clarendon College center in Pampa, Texas (ID# 39511)

Dear Representative Chisum:

On behalf of Clarendon College, you ask whether the Pampa Economic Development Corporation may contribute to a Clarendon College center in Pampa, Gray County, Texas.

We have been provided with very little information about either the Pampa Economic Development Corporation or the Clarendon College center at issue. We understand that the Pampa Economic Development Corporation is a development corporation created by the City of Pampa under section 4A of the Development Corporation Act of 1979, V.T.C.S. art. 5190.6 (the "act"). We assume that Clarendon College is interested in the development corporation's authority to contribute sales and use tax revenues generated under section 4A of the act. We address this issue in general terms. We assume that there are no limitations on the expenditure of the funds particular to the Pampa Economic Development Corporation.¹ In addition, we do not address the authority of the development corporation to expend any other funds.

Clarendon College is a public junior college, the purpose of which is set forth in section 130.003(e) of the Education Code.² The service area of the Clarendon College District is defined

¹The authority of any particular development corporation may be limited by the resolution creating the corporation or ballot language restricting the use of the section 4A tax. See, e.g., V.T.C.S. art. 5190.6 §§ 4(a) (resolution creating corporation must specify its purpose), 4A(r) (election on imposition of tax may limit use of proceeds to specific project).

²Section 130.003 of the Education Code provides in pertinent part:

The purpose of each public community college shall be to provide:

(1) technical programs up to two years in length leading to associate degrees or certificates;

(2) vocational programs leading directly to employment in semi-skilled and skilled

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by Education Code section 130.173, which was recently amended to include all of Gray County. See S.B. 109, Acts 1997, 75th Leg., R.S. (eff. Apr. 17, 1997). We have not been provided with any information about the specific purpose of the Clarendon College center in Pampa. We assume it will provide programs consistent with section 130.003. *See supra* note 2.

Before a section 4A sales and use tax may be levied, it must be approved by the voters, the ballot providing for the "adoption of a sales and use tax for the promotion and development of new and expanded business enterprises." V.T.C.S. art. 5190.6, § 4A(m). Section 4A sales and use taxes may be expended for "promotional purposes,"³ for "projects" defined by the act,⁴ or for other

²(...continued)
occupations;

- (3) freshman and sophomore courses in arts and sciences;
- (4) continuing adult education programs for occupational or cultural upgrading;
- (5) compensatory education programs designed to fulfill the commitment of an admissions policy allowing the enrollment of disadvantaged students;
- (6) a continuing program of counseling and guidance designed to assist students in achieving their individual educational goals;
- (7) work force development programs designed to meet local and statewide needs;
- (8) adult literacy and other basic skills programs for adults; and
- (9) such other purposes as may be prescribed by the Texas Higher Education Coordinating Board or local governing boards in the best interest of post-secondary education in Texas.

³V.T.C.S. art. 5190.6 § 4A(b)(1); Letter Opinion No. 94-037 (1994) at 3.

⁴See V.T.C.S. art. 5190.6 § 2(10). Section 2(10) of the act defines the term "project" in pertinent part as follows:

"Project" shall mean the land, buildings, equipment, facilities, and improvements (one or more) found by the board of directors to be required or suitable for the promotion of development and expansion of manufacturing and industrial facilities, transportation facilities (including but not limited to airports, ports, mass commuting facilities, and parking facilities), sewage or solid waste disposal facilities, recycling facilities, air or water pollution control facilities, facilities for the furnishing of water to the general public, distribution centers, small warehouse facilities capable of serving as decentralized storage and distribution centers, and facilities which are related to any of the foregoing, and in furtherance of the public purposes of this Act, all as defined in the rules of the department, irrespective of whether in existence or required to be identified, acquired, or constructed thereafter.

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contracts that will enhance economic development.⁵ As a general matter, the determination whether a particular expenditure of section 4A tax proceeds is consistent with the economic development purposes of the act involves factual issues and is within the discretion of the board of directors of the development corporation in the first instance.⁶ Finally, the city that creates a development corporation "will approve all programs and expenditures of the corporation and annually review any financial statements of the corporation." *Id.* § 21.

Although the determination whether a particular expenditure of section 4A tax proceeds is consistent with the economic development purposes of the act is within the discretion of the board of directors of the development corporation in the first instance, you have provided us with no information that would support a determination that such an expenditure relating to the Clarendon College center would foster economic development.⁷ This office has previously concluded that education does not, as a general matter, constitute economic development. *See Attorney General Opinion JM-1255* (1990) at 8 (concluding that Tex. Const. art. III, § 52-a not "intended to overcome any constitutional prohibition against municipalities assisting school districts to acquire school facilities through the use of municipal powers"). In Letter Opinion No. 92-86, this office opined that a section 4A development corporation was authorized to use funds generated by its sales and use tax to finance bonds for the start-up costs of a Texas State Technical College System extension center.⁸ That opinion concluded that it was within the discretion of the board of the economic development corporation to characterize that use of section 4A tax proceeds as a "project" under section 2(10) of the act because the legislature had specifically determined in chapter 135 of the Education Code that the specific purpose of the Texas State Technical College System is to promote economic

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In addition, section 4A(f) of the act excludes certain projects from this definition. *Id.* § 4A(f).

⁵See *Gaut v. Amarillo Economic Dev. Corp.*, 921 S.W.2d 884 (Tex. App.--Austin 1996, no writ) (concluding that section 4A development corporation is not limited to undertaking only projects as defined by act and that contract for jet service a permissible use of section 4A tax proceeds).

⁶See *id.* at 887-88; Letter Opinion Nos. 95-072 (1995) (determination whether section 4B development corporation may construct sanitary sewer lines in existing residential subdivision must be made by board of directors in first instance subject to review for abuse of discretion), 92-86 (1992) (concluding that it was within discretion of section 4A development corporation in the first instance to characterize use of sales and use tax proceeds to finance bonds for Texas State Technical College System extension center as promotion of commercial or economic development given statute governing such centers).

⁷Clearly, the determination that an expenditure is within the purposes of the act must be supported by the facts. In the *Gaut* case, for example, the court found that the record supported the conclusion that the expenditure as issue, payments pursuant to a contract for jet service into the City of Amarillo, was permissible under the act, stating that "summary judgment evidence reflected the probable enhancement to the Amarillo economy as well as the economic benefits to the resident of the Texas panhandle." *See Gaut*, 921 S.W.2d at 887. The court also noted that the parties appeared to concur that the jet service contract "will enhance the economy and employment opportunities in Amarillo." *Id.*

⁸Letter Opinion No. 92-86 (1992) at 2.

development.⁹ By contrast, the legislature has not specifically determined that junior college districts promote economic development nor has it vested junior college districts with that purpose.¹⁰ Such a purpose certainly is not apparent from Education Code section 130.003, which defines the purpose of junior colleges. Therefore, on the basis of the information provided, it does not appear that the development corporation board would be justified in making such an expenditure.

Furthermore, even if one could reasonably conclude that the center would promote economic development, it appears from the Clarendon College letter included with your request that the college would like to obtain a contribution -- in other words, a gift -- from the development corporation. This office has never construed article 5190.6 to authorize a development corporation to make a gift of section 4A sales and use taxes. Indeed, this office has previously stated that the act does not authorize a section 4A development corporation to make gifts: “[T]he act requires that any ‘grant’ by [the development corporation] . . . be made under contractual or other arrangement sufficient to ensure that the funds granted are actually used in furtherance of the purposes of the act.” Letter Opinion No. 94-037 (1994) at 3.

Finally, the Clarendon College letter suggests that the court’s construction of the act in *Gaut v. Amarillo Economic Development Corporation*, 921 S.W.2d 884 (Tex. App.—Austin 1996, no writ), gives development corporations unfettered latitude to “promot[e] the interests of their constituents.” In *Gaut*, the court concluded that a section 4A development corporation was authorized to enter into a contract with an airline company whereby the development corporation made payments to the airline company to provide jet service to the city. *Gaut* involved a contract. The development corporation received valuable consideration in return for the payments and, presumably, the contract contained terms to ensure that the development corporation received the bargained-for quid pro quo, continued jet service. *Gaut* does not stand for the proposition that a

⁹See, e.g., Educ. Code §§ 135.01 (system “shall contribute to the educational and economic development” of the state), .54 (authorizing board of regents of system to contract to provide “programs for economic development that benefit this state”).

¹⁰Compare *id.* ch. 135 (Texas State Technical College System) with *id.* ch. 130 (junior college districts).

development corporation is permitted to make donations of public funds.¹¹ Similarly, the transaction at issue in Letter Opinion No. 92-86 did not involve a gift.

In conclusion, given the information provided, it appears that the board of directors of the Pampa Economic Development Corporation would have no basis on which to conclude that an expenditure of section 4A tax proceeds to support a Clarendon College center in Pampa, Texas would be consistent with the purposes of the act. Furthermore, the act does not permit a section 4A development corporation to make gifts of public funds.

¹¹The Development Corporation Act of 1979 defines the powers of a development corporation in part by reference to the powers given to non-profit corporations in the Texas Non-Profit Corporation Act, V.T.C.S. arts. 1396-1.01-11.01. See V.T.C.S. art. 5190.6 § 23(a). The *Gaut* court relied on powers set forth in the Texas Non-Profit Corporation Act, particularly article 1396-2.02(A)(8), which authorizes a nonprofit corporation to "make contracts, to conclude that development corporations are not limited to expending funds on projects as defined in the Development Corporation Act of 1979. Article 1396-2.02(A)(13) authorizes a nonprofit corporation to "make donations for the public welfare or for charitable, scientific, or educational purposes and in time of war to make donations in aid of war activities." We believe that this general power to make donations to worthwhile causes is inconsistent with the Development Corporation Act of 1979. See *id.* (referring to the Texas Non-Profit Corporation Act but then providing that "to the extent that the general laws are in conflict or inconsistent with this Act, this Act prevails."); Letter Opinion No. 94-037 (1994) at 3 (the Development Corporation Act of 1979 "requires that any 'grant' by [the development corporation] be made under contractual or other arrangement sufficient to ensure that the funds granted are actually used in furtherance of the purposes of the act."); see also Attorney General Opinion JM-1255 (1990) at 8-9 (opining that Tex. Const. art. III, § 52-a was not "intended to change the requirements that public resources and powers be used for 'the direct accomplishment of a public purpose' and that [the] transactions using such resources and powers contain sufficient controls 'to insure that the public purpose [is] carried out.'").

S U M M A R Y

Given the information provided, it appears that the board of directors of the Pampa Economic Development Corporation would have no basis on which to conclude that an expenditure of section 4A tax proceeds to support a Clarendon College center in Pampa, Texas would be consistent with the purposes of the Development Corporation Act of 1979. Furthermore, the act does not permit a section 4A development corporation to make gifts of public funds.

Yours very truly,



Mary R. Crouter
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Opinion Committee