

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

December 7, 2018

Kenneth E. Stockton, Esq.
Attorney, City of Hernando
449 West Commerce Street
Hernando, MS 38632

Re: City of Hernando, Mississippi – Sewer Line Extension

Dear Mr. Stockton:

Attorney General Jim Hood has received your request for an official opinion and assigned it to me for research and reply.

Background and Issues Presented

Your letter states as follows:

The following is a brief historical background in regard to the opinion being sought and which should be helpful.

There exists a large tract of land, consisting of approximately a thousand one hundred (1,100), acres more or less, in the city limits of Hernando, Mississippi. This property is currently part of a major development known as "Hernando West" and which will develop in phases. Currently there has only been one small phase developed and which is a phase consisting of lots currently fronting on existing city streets where city water and sewer service is available. This initial phase is known as Phase I, The Historic Mansion Neighborhood of the Residential District at Hernando West Subdivision.

The owners/developers of this subdivision, being Hernando West Development, LLC (hereinafter referred to as Developers) have approached the City of Hernando, Mississippi about having a sewer line extended from the city's existing sewer line to an area adjacent to an area not yet developed as owned by the Developer. This is an area that is

north of the aforementioned Phase I. The Developers have proposed that the City of Hernando apply for a CAP (Capital Improvements Revolving Loan Program) loan in an amount of \$750,000.00 to pay in part for the cost of extending a major sewer service line to a certain point at the edge of the "Hernando West" development so that the Developer could then connect for the sewer lines within the development. The CAP loan would be payable over a period of twenty (20) years under such terms as allowed at that time.

The construction of the sewer line would of course be a City project subject to all the statutory requirements attendant thereto and all City rules and regulations would apply as well.

Accordingly, the City of Hernando would like an opinion from your office to the following:

May the City of Hernando, Mississippi enter into an agreement with a private property owner, who in this case would be the developer as well, in the manner proposed as set forth below:

- OFFICIAL OPINION**
1. May the City of Hernando, Mississippi accept rights of way and engineering plans from the Developer in exchange in part for the construction of a "main" sewer line to be extended from an existing city sewer line to an area of the property being developed?
 2. May the City of Hernando, Mississippi apply for a CAP loan (\$750,000.00) for the purpose of extending a sewer line from an existing city sewer line to a private development? *Note: This is for an access point only and the City would not be constructing any internal lines within the development.* Also, may the City of Hernando make a special assessment on the property owned by the private property owner/developer for the purpose of repaying said CAP loan?
 3. May the City of Hernando, Mississippi enter into an agreement with a private property owner/developer for the purpose of [e]nsuring that any costs in excess of \$750,000.00 for the construction of the sewer line extension be paid by the private property owner/developer? *Note: This amount would be known after the bids were solicited for the project.*
 4. May the City of Hernando enter into an agreement to hold funds in escrow from a private property owner/developer for the purpose of [e]nsuring that the City of Hernando would have funds available for the payment of the first year['] s CAP loan payment?
 5. May the City of Hernando hold in the form of a Certificate of

Deposit funds provided by the private property owner/developer for the purpose of [e]nsuring that any shortfall in the collection of the special assessments during the course of the loan term? Note: This scenario would most likely arise if there were tax/assessment payments that were not paid timely and the CAP loan payment would be due at such time when all of the funds necessary for the payment were not in hand. Also, what mechanism if any would be allowable to allow for such security payment?

The Developer has expressed to the governing authorities of the City of Hernando that it wants to [e]nsure that the City of Hernando is not "out of pocket" any expenses, payments or other amounts in the construction of the proposed "main" sewer line. That although it may be understood the City would of course be able to use the line in the future should a connection be necessary.

Analysis and Discussion

Your first question asks about the authority of a municipality to "accept rights of way and engineering plans" from a local developer "in exchange in part for the construction of a 'main' sewer line to be extended from an existing city sewer line to an area of the property developed." This office does not approve contracts of public entities with private parties nor can we pass on the validity thereof. In this case, we are unsure as to the nature or manner in which the rights of way or engineering services are to be given to the city, whether this question relates to a donation, or whether the rights of way and engineering services are in consideration for some mutual contractual promise by the City of Hernando (the "City"). Questions two (2) through five (5) all center on the City's authority to enter into certain types of agreements. Again, we do not approve such contracts. Moreover, we are not aware of how these contracts would be structured or to what exactly the City would be agreeing. Thus, we cannot provide a specific answer to any of your questions. If, upon further review, the City has discrete questions of state law regarding authority to take a specific act or enter into a specific type contract, our office may be able to provide answers by official opinion. For these reasons, this opinion must, by necessity, be general in nature and will discuss the general authority of municipalities. Hopefully, with its detailed knowledge of the proposed structure, the City can apply these legal principles to its particular circumstances.

With regard to a municipality's authority to extend sewer lines, this office has repeatedly opined that:

[A] city may and is legally obligated to extend its service to furnish adequate water supply to its residents where there is a reasonable demand for the service and a reasonable extension of the service can be made to meet the demand, considering the cost of the extension and the maintenance of the service, the present and prospective number of subscribers or customers, the present development and the prospective growth and development of the

locality to be served, and the present and prospective revenue to be obtained from furnishing water in the territory to be served by such extension. As this opinion also states, if a municipality constructs a water main on or across private property for the purpose of providing adequate service to consumers, subject to lawfully acquired right-of-way easement, the city would not be entitled to reimbursement. This opinion notes that the city does not have authority to install a main line on private property for the sole benefit of a property owner. Finally, this opinion states that whether a water line is a part of the main line or is a private service line connecting individual property owners is a question of fact to be determined by the governing authorities. The enclosed opinion to Thomas Goldman, August 27, 1987, states that **a municipality may construct a water line on private property, subject to proper easement, when such construction is a part of the overall purpose and plan of providing present and future utility service to the general public by future connections or extensions.** See also the enclosed opinion to Lomax Lamb, July 16, 1980 (statutory authority for municipality to install water/sewer lines in rights-of-way of public streets).

MS AG Op., Hammack (April 12, 1995)(emphasis added).

Assuming the area is not serviced by another certificated provider, a municipality can extend sewer lines where it finds that there is reasonable demand, and the extension is justified by the facts. Where proper easements or rights of ways are obtained, sewer lines may be constructed on private property where the "construction is part of the overall purpose and plan of providing present and future utility service to the general public . . ." A municipality is precluded from using public funds to extend a sewer line for the "sole purpose of serving the property owner only." MS AG Op., Smith (July 31, 1986). Prior to making any decision to extend a sewer line, the factual findings set forth in Hammack must be appropriately made by the municipality.

Assuming that the foregoing factual findings have been made, a municipality may accept donations from private entities for the purpose of constructing the sewer line extension. As previously noted, we are unsure as to exactly how the "rights of ways" and engineering service are to be transferred to the City. However, we have previously opined that:

[A] municipality may accept donations of funds for specifically designated purposes. MS AG Op., Herring (February 12, 2010); MS AG Op., Moran (February 24, 2006); MS AG Op., Bruni (May 15, 1998); MS AG Op., May (July 12, 1990). See also MS AG Op., Matthews (November 3, 2006) (county may accept donations for a particular purpose). Once accepted, the donated funds must be placed in the municipal treasury and may only be used for proper municipal purposes. Such funds become municipal funds and may only be expended in accordance with state purchasing laws, including bidding mandates.

As we have discussed in earlier conversations regarding your inquiry, no authority exists which would permit a municipality to reimburse a developer for his costs associated with providing infrastructure. See MS AG Op., Mallette (May 18, 2007)(If developer offers to provide funds to be used for the purchase of a water system with no repayment obligation of the municipality, the municipality may accept said funds). According to the factual scenario contained in your request, **the developer is proposing to donate funds for the purpose of “defraying a portion of the total project cost for the laying of the water line” and expects no repayment from the municipality. Given these facts, we see no prohibition barring the acceptance of the proposed donated funds.**

MS AG Op., Brown (April 6, 2016)(emphasis added).

Thus, it remains our opinion that a municipality may accept conditional donations that are designated for a specific purpose. To the extent that the private developer is proposing conditional donations¹ for a sewer line extension that meets the criteria for necessity, reasonableness and public purpose discussed in our Hammack opinion, such donations could be proper. Whether or not the specifics of the City’s proposed project meet the requirements is a factual determination that must be made by the City subject to review by the Office of State Auditor and the courts.

With regard to your second question as to whether the City may apply for or is eligible for a Capital Improvements Revolving Loan Program (“CAP loan”), we cannot answer that question. CAP loans are governed by Sections 57-1-303, *et seq.*, of the Mississippi Code Annotated. The CAP loan program is administered by the Mississippi Development Authority (“MDA”). Pursuant to Section 57-1-305, MDA is required to “certify” all projects. Likewise, MDA is given regulatory authority to administer the CAP loan program. Accordingly, we suggest that you discuss the eligibility of your project for CAP financing with MDA.

Questions three (3) through five (5) all relate to the authority of the City to enter into contractual arrangements whereby the private developer provides security for payments owed by the City under the proposed CAP loan referenced in question number two (2). All of these agreements seem to be in the form of or similar to some type of payment guaranty. You do not provide the specifics of any of the proposed agreements, and we cannot opine in the abstract as to the City’s authority to enter into such agreements. If the agreements are in the form of a guaranty, then it is certainly possible that the City could structure such an agreement that would comply with state law. The details of such an agreement and other matters of deal structure are issues that should more appropriately be addressed through the attorney-client relationship and in the form of legal advice. This office cannot by official opinion offer such legal advice.

¹ The City should ensure that it complies with the Real Property Acquisition Policies Law. See Miss. Code Ann. Section 43-37-1, *et seq.* (as amended). In particular, Section 43-37-3(1)(j) sets out certain requirements where donations are contemplated.

Kenneth E. Stockton, Esq.
December 7, 2018
Page 6

If this office can be of further assistance, do not hesitate to contact us.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: 

Ricky G. Luke
Assistant Attorney General

OFFICIAL OPINION