

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

January 11, 2019

Kevin Melchi, Esq.
Attorney, City of Ocean Springs
Post Office Box 697
Ocean Springs, Mississippi 39566

Re: Establishment of nonprofit entity for beautification purposes

Dear Mr. Melchi:

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

Issues Presented

You inquire as to whether a municipality may establish a nonprofit entity for the purpose of raising and spending funds for beautification efforts of the city. Specifically, you provide the following:

I am the City Attorney for the City of Ocean Springs and am seeking this opinion at the request of Mayor Shea Dobson.

The City wishes to find private sources of funding to contribute to beautification efforts in Ocean Springs. These funds would go toward construction and maintenance of flower beds and other decorative fixtures throughout the City. It is anticipated that the cost of such efforts will exceed what the City can reasonably afford, given its current budget.

The City wishes to generate money for this beautification effort from outside City funds, such as through private donations. The Mayor would like to establish a separate nonprofit entity that could solicit and accept funds, donations, organize events, and dedicate funds received specifically to beautification efforts. This private entity would be established with the City of Ocean Springs as its sole member or perhaps in conjunction with another group, such as the Chamber of Commerce. Mayor Dobson would like to have an opinion whether the establishment of such a nonprofit entity is legal, whether as a solo venture or with a partner.

The City of Ocean Springs formally requests opinions on the following issues:

- 1) Can the City form, and be the only member thereof, a nonprofit entity whose sole purpose is the raising and spending of funds dedicated to the beautification efforts in the City?
- 2) Can the City be a partner in a nonprofit entity whose sole purpose is the raising and spending of funds dedicated to beautification efforts in the City?

Response

The municipality may not establish a nonprofit entity for the purpose of performing governmental functions regardless as to whether it is the sole member of the nonprofit entity or a partner.

Applicable Law and Discussion

As to the scope of the powers of a municipality, it is well-settled that a municipality is solely a creature of the Legislature and has only such powers as are conferred by statute or which are necessarily implied for the proper exercise of the powers clearly conferred. *Bishop v. City of Meridian*, 223 Miss. 703, 79 So.2d 221 (1955); *Hattiesburg Firefighters Local 184, et al. v. City of Hattiesburg*, 263 So.2d 767 (1972)(municipality can exercise only such powers as are clearly delegated by the Legislature and such powers cannot be extended by mere implication). Generally-speaking, a municipality has not been vested with the power to establish a nonprofit entity. *Compare* Miss. Code Ann. Section 41-13-35(n)(county hospitals authorized to operate on nonprofit basis). *See also* MS AG Op., O'Donnell (March 27, 1998)(county hospital may establish nonprofit per Section 41-13-35).

Section 21-17-3 of the Mississippi Code specifically provides that the "powers granted to municipalities by law shall be exercised by the governing authorities of such municipalities, in the manner provided by law." To the extent that the municipality is creating a nonprofit to perform a municipal function, Section 21-17-3 prohibits the municipality from doing so.¹ The proposed arrangement raises the question that the municipality, in establishing a nonprofit entity, has changed the "structure...of the municipal government", which is prohibited by Section 21-17-5, the "home rule statute," in the absence of specific statutory authority. The fact that the municipality would be exercising its authority through a nonprofit entity, whether as a sole member or a

¹While, in our opinion, Section 17-13-1 appears to authorize a municipality to expend municipal funds for the purpose of bringing the municipality into favorable notice, it lacks the authority to delegate its power to do so to another entity, even when the entity is one that the municipality created itself.

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partner, would be inconsistent with the requirements that municipal powers be exercised by the governing authorities of the municipality. Aside from the aforementioned, the proposed scenario raises a number of issues for the municipality, i.e., issues of liability, insurance, tort claims, workers compensation, etc.

With respect to the authority of a municipality to solicit donations, we have consistently opined that it has the authority to solicit donations. See MS AG Op., Thames (October 2, 2009); MS AG Op., Edwards (April 18, 2008); MS AG Op., Polk (April 10, 2008). Furthermore, governing authorities may accept donations of funds for lawful municipal purposes and such funds "must be accounted for and expended as any municipal funds." MS AG Op., Piazza (April 20, 2007); MS AG Op., Moran (February 24, 2006). In regard to the municipality's authority to promote the municipality itself, Section 17-3-1 provides the express authority to:

set aside, appropriate and expend moneys, not to exceed one mill of their respective valuation and assessment for the purpose of advertising and bringing into favorable notice the opportunities, possibilities and resources of such municipality or county.


In our opinion, funds expended for beautification efforts within the municipality appear to be consistent with the intent of Sections 17-3-1 *et seq.* However, as a proper municipal exercise of authority, these acts should be "exercised by the governing authorit[y]" and not via a nonprofit entity.²

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:


Leigh Triche Janous
Special Assistant Attorney General

² Obviously, nothing contained herein would prevent a municipality from contracting with a private party for beautification purposes.