



State of Louisiana
 DEPARTMENT OF JUSTICE
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 ATTORNEY GENERAL

SEP 14 2012
 OPINION 12-0114

84 PARISHES
 90-A-1 PUBLIC FUNDS & CONTRACTS
 90-A-2 PUBLIC FUNDS – Loan, Pledge or Grants

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La. Const. Arts. VI, § 5, VII, § 14
 La. Atty. Gen. Op. Nos. 11-0108, 10-0171, 10-0013, 09-0274, 09-0271,
 09-0259, 09-0251, 09-0146, 08-0109, 07-0050A, 05-0299, 87-0464.

Pursuant to La. Const. Art. VII, § 14, the Caddo Parish Commission is prohibited from legally expending public funds to clean up overgrown private property.

Dear Mr. Grubb:

You have requested an opinion of this Office regarding the Caddo Parish Commission (hereinafter the "Parish" or "Commission") appropriating funds to clear a body of water (drainage ditch) behind private homes in a neighborhood. In your request, you state that the body of water in question was at one time part of the bed of the Red River, and that the Parish is of the opinion that the bed is now owned by the abutting private property owners to the mid-point of the former riverbed.¹

You indicate that this drainage ditch is overgrown with trees and bushes. You have also indicated that:

[t]he Commission received evidence that the condition of the property poses immediate health hazards to the entire neighborhood, not just the residences that abut the abandoned riverbed. It is a breeding ground for snakes, mosquitoes and other varmints. The neighbors have legitimate concerns that the property could be an attractive habitat for alligators.

Therefore, the issue is essentially whether the Parish can legally expend public funds to clean up private property that may pose health and safety risks to the general public.

La. Const. Art. VII, § 14 sets forth the general prohibition against public entities gratuitously alienating public funds or property. It provides, in pertinent part, the following:

¹ In cross checking this area with the State Land Office Web site (<http://www.doa.louisiana.gov/SLO/Disclaimer.htm>), it appears that this area is not claimed by the State and is in fact likely owned by the abutting private landowners.

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CADDO PARISH
 ATTORNEY

(A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private ...

Article VII, § 14 "is violated when public funds or property are gratuitously alienated."² It has been the consistent opinion of this Office that in order for an expenditure of public funds to be permissible under Louisiana Constitution Article VII, § 14(A), the public entity must have the legal authority to make the expenditure and must show: (i) a public purpose for the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue; (ii) that the expenditure or transfer, taken as a whole, does not appear to be gratuitous; and (iii) that the public entity has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds.³ In applying La. Const. Art. VII, § 14, we must consider each element, listed above, independently.

A public purpose for the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue.

The public purpose, under the facts set forth in your opinion request, would be the removal of health hazards that may affect nearby neighborhoods as well as the removal of a haven for snakes, mosquitoes, and other varmints. The parish, which operates under a home rule charter,⁴ may exercise the "power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with [the] constitution."⁵

Section 2-05 of the Caddo Parish Home Rule Charter, entitled "Special Powers" states:

[t]he parish government shall have the right, power and authority to pass all ordinances requisite or necessary to promote, protect and preserve the general welfare, safety, health, peace and good order of the parish, including, but not by way of limitation, the right, power and authority to pass ordinances on all subject matters necessary, requisite or proper for the management of parish affairs, and all other subject matter without exception, subject only to the limitation that the same shall not be

² *Board of Directors of the Industrial Development Board of the City of Gonzales, Louisiana, Inc. v. All Taxpayers, Property Owners, Citizens of the City of Gonzales, et al.*, 2005-2298 (La. 9/6/06), 938 So.2d 11, 20.

³ See La. Atty. Gen. Op. Nos. 10-0171, 09-0271, 09-0259, 09-0251, 09-0146 and 07-0050A.

⁴ Section 2-01 of the Caddo Parish Home Rule Charter.

⁵ La. Const. Art. VI, § 5(E).

inconsistent with the constitution or expressly denied by general law applicable to the parish.

The Parish seeks to clean private property to remove health and safety risks to the general public. Therefore the Parish does, in fact, have a public purpose, or at least a public interest, for the expenditure or transfer that comports with the governmental purpose for which the public entity has legal authority to pursue.

The expenditure or transfer, taken as a whole, does not appear to be gratuitous.

In considering whether such an expenditure of public funds is "gratuitous when taken as a whole," it should be noted that such a decision can only be made considering all factual nuances. It should be noted that while this opinion may make certain limited conclusions with regard to the facts provided, the consideration of various factual nuances and a meaningful application of the law to those facts remains within the province of the courts.⁶

With regard to the proposed expenditure of public funds here, the Parish would very simply be cleaning up private property with Parish funds. While the owners of these private parcels (adjacent to the overgrown area) would undoubtedly benefit the most from this expenditure of funds, the general public would also indirectly benefit from the cleaning of the overgrown area and especially the removal of the health and safety risks currently associated with the overgrown area.

"In general terms, our office has consistently opined that public funds and/or equipment may not be used to repair private property."⁷ In the majority of these prior opinions, the issue revolved around repairs to private roads or access routes.⁸ While clearing an overgrown area is not a "repair" per se, we believe there is no significant distinction to be made here between "repairing" and cleaning or clearing an overgrown area.

In La. Atty. Gen. Op. No. 11-0108, this Office concluded that "the use of public funds to repair private alleyways would be a gratuitous donation prohibited by La. Const. Art. VII § 14." In La. Atty. Gen. Op. No. 10-0013, this Office opined on the issue of whether Plaquemines Parish had the authority to repair private roads which were primarily damaged "by heavy equipment vehicles engaged in storm recovery activities over an extended period of time." In that opinion, we stated that,

⁶ La. Atty. Gen. Op. No. 09-0274.

⁷ La. Atty. Gen. Op. No. 10-0013, referencing La. Atty. Gen. Op. Nos. 87-464, 05-0299, 08-0109.

⁸ See La. Atty. Gen. Op. Nos. 05-0299, 10-0013, and 11-0108.

[c]onsidering the foregoing, under certain limited circumstances, the use of parish equipment, materials, supplies, and labor to repair private roads would not be tantamount to a prohibited donation pursuant to Article VII, §14 of the Louisiana Constitution. In order to be permissible, it is the opinion of this office that Plaquemines must ensure, at a minimum, that: (1) only those private roads which were damaged by Plaquemines employees and/or contractors are repaired, and (2) the extent of repairs performed on those roads are limited to only those damages caused Plaquemines employees and/or contractors. The prohibited donation provision of Article VII, §14 also requires that Plaquemines determine whether it is entitled to indemnification by any contractor for the damages referenced above.⁹

La. Atty. Gen. Op. No. 05-0299 stated that "the Parish's use of public funds, materials or labor to repair roads on private property would be an unlawful donation in violation of Article VII, Section 14(A)." In La. Atty. Gen. Op. No. 88-384, this Office opined that "[p]roviding the manpower required to repair these privately owned sidewalks requires the use of public funds. This practice constitutes a donation of public funds to a private person which is expressly prohibited..."

With regard to the applicability of La. Const. Art. VI, § 14, this Office has previously opined that "[t]he jurisprudence also makes it clear that the worthiness of the contemplated use of public funds is immaterial to the constitutionality of the transfer of public funds."¹⁰ In the case cited in that opinion, the Second Circuit Court of Appeal stated that:

[t]hough it may be regarded as an unnecessary comment, we think it is appropriate in the instant case to observe that these specific prohibitions have been wisely implanted in our fundamental law, for it is conceivable that without such prohibitions the State, or a political subdivision thereof, might so deplete the public fisc by contributions to almost innumerable worthy private and semi-public enterprises as to seriously impair the necessary expense of conducting more prosaic but more important governmental functions.¹¹

⁹ La. Atty. Gen. Op. No. 10-0013.

¹⁰ La. Atty. Gen. Op. No. 05-0299, citing *James v. Rapides Parish Police Jury*, 113 So.2d 88 (La. App. 2 Cir. 1959).

¹¹ *James v. Rapides Parish Police Jury*, 113 So. 2d 88, 93 (La. App. 2 Cir. 1959).

The Supreme Court has stated "[i]f gratitude and love, instead of an intent to impose or a desire to remunerate, motivated the donor, the donation is gratuitous, subject to the rules peculiar to donation inter vivos"¹² and "[a] gratuitous act is that whereby a person confers or engages to confer upon another an advantage without receiving from him, or without having been promised by him, an advantage that would constitute the counterpart thereof, so that his act is intentionally gratuitous."¹³ This jurisprudence is quite helpful in discerning what is in fact a "gratuitous" transfer.

In applying these legal precepts to the current facts, clearing the overgrown area would indirectly benefit the general public, but on its face, such an expenditure would appear to be gratuitous to the private landowners owning property adjacent to the overgrown area. Therefore, in considering the proposed expenditure and all of the guidance above, this Office is of the opinion that expending Parish funds to clean up private property would appear to be gratuitous when taken as a whole, even though the general public would indirectly receive benefits from such an expenditure or transfer.

The public entity has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds.

In considering this third and final element, the issue is whether the Parish has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds to clear the overgrown private property.

Here, considering the facts and the clear, direct benefit to certain private landowners and the indirect benefit to the general public, this Office is of the opinion that the Parish does not have a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the expenditure or transfer of public funds.

CONCLUSION

Pursuant to La. Const. Art. VII, § 14, it is the opinion of this Office that the Caddo Parish Commission is prohibited from legally expending public funds to clean up overgrown private property.

¹² *Bd. of Directors of Indus. Dev. Bd. of City of Gonzales, Louisiana, Inc. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales*, 938 So. 2d 11, 21 (La. 2006), citing Frederick William Swaim, Jr. & Kathryn Venturatos Lorio, 10 Louisiana Civil Law Treatise, Succession and Donations § 9.13 at 228 (1995).

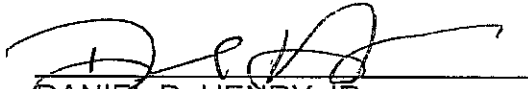
¹³ *Id.* at 22, citing 3 Aubry & Rau, Civil Law Translations, *Testamentary Successions and Gratuitous Dispositions*, § 644 (1969).

We trust this adequately responds to your request. If you should have any questions about the response contained herein, please feel free to contact our office.

Yours very truly,

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BY:



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Assistant Attorney General

JDC/DDH, JR/jv