# 50. The Public Purpose Doctrine

In pertinent part, Section 94, Alabama Constitution, 1901, states that: w"The Legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association. . . ."

Section 94 is designed to prevent expenditure of public funds in aid of private individuals and corporations. *See, Opinion of Justices*, 319 So.2d 682 (Ala. 1975). In *Opinion of the Justices*, 49 So.2d 175 (Ala. 1950), the Court said: "It has been pointed out that the evil to be remedied is the expenditure of public funds in aid of private individuals or corporations, regardless of the form which such expenditures may take, and that Section 94 prohibits, in the words of the decision in *Garland v. Board of Revenue of Montgomery County,* 6 So. 402 (Ala. 1889), 'any aid ... by which a pecuniary liability is incurred'."

This is similar to the rule followed by most municipalities throughout the country. According to McQuillin, *Municipal Corporations* Section 39.19 (3d Ed. Rev.), "a municipality has no power ... to donate municipal moneys for private uses to any individual or company not under the control of the city and having no connection with it, although a donation may be based on a consideration." Section 94 carries this prohibition into effect and prevents municipalities from giving anything of value to a private person or entity.[1]

Section 94 is not violated where compensation is exchanged for services and benefits rendered. *See, Taxpayers & Citizens of Foley v. Foley*, 527 So.2d 1261 (Ala.1988). Thus, municipalities may contract for services with private persons (as long as the municipality itself has the authority to perform the service being contracted for), but cannot simply give away public money, goods or services.

Additionally, courts have held that expenditures that serve a "public purpose" do not violate Section 94. The public purpose standard was made part of the Alabama Constitution in 2004, when Section 94.01 (Amendment 772) was added to give municipalities (and counties) more flexibility to encourage economic development. Section 94.01 permits local public governments to, among other things, use public funds or other items of value in "aid of or to any individual, firm, corporation, or other business entity, public or private, for the purpose of promoting the economic and industrial development of the county or the municipality." Section 94.01 specifically exempts public agencies from the restrictions of Section 94.

A recent AGO, to Jimmy Calton, August 6, 2007, interprets Section 94.01, and notes two conditions a municipality must comply with before giving aid pursuant to this provision. As noted in the Attorney General's Opinion, "subsections (c)(l) and (c)(2) require that the proposed action serve a valid public purpose and that notice and a meeting be held regarding the proposed action." AGO 2007-122

Specifically, subsection 94.01(c)(1) requires the passage of "a resolution containing a determination by the governing body that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose, notwithstanding any incidental benefit accruing to any private entity or entities." Thus, in order to use public funds, equipment, facilities or any other public item of value to encourage economic development, the public entity must still justify the action by determining that a public purpose exists.

The public purpose test establishes a somewhat confusing standard for municipal officials to follow when they make decisions about the expenditure of public funds. Instead of a bright-line test where the only important fact an official must know is whether the entity or person requesting funds is public or private, officials are left to determine for themselves whether the purpose the funds will be used for is, in fact, public in nature. Clearly, this will be difficult in many cases.

This article examines some of the issues surrounding the public purpose doctrine in the hopes of clarifying what constitutes a public purpose.

**The Standard of Review**

In some cases, a request for municipal funds obviously does not serve a public purpose. In these situations, officials will be expected to decline the request. For example, if a church asks the municipality to pave its parking lot, this expenditure is designed only to benefit those who attend that church. But what if a municipality is facing a severe parking crisis in its downtown area and the church offers

1 There are, of course, exceptions to this prohibition, and there are a number of cases and Attorney General's Opinions that have approved expenditures to private persons. For a more thorough examination and a list of these decisions, see the article "Authority to Expend Municipal Funds," *Selected Readings for the Municipal Official*

to open the lot for public use every day except Sunday? Does the public need for parking override the prohibitions of the Alabama Constitution?

There is no clear-cut answer to that question (*But see, Guarisco v. Daphne*, 825 So.2d 750 (Ala.2002), discussed below). The interpretation of what constitutes a public purpose will, of course, vary from official to official. What one councilmember sees as a benefit to the public will be seen by others as a detriment. Officials will have to resolve these issues by debate and should rely heavily on the advice of their attorneys.

There will be times, though, when the attorney cannot provide a definitive answer and can only offer guidance. In those instances, it is important to remember the standard of review that generally applies to discretionary actions of municipal officials. In those instances, courts usually defer to the decisions of a governing body unless that decision is clearly incorrect.

In *Opinion of the Justices No. 269*, 384 So.2d 1051 (Ala.1980), the Court stated that, "[T]he question of whether or not an appropriation was for a public purpose [is] largely within the legislative domain, rather than within the domain of the courts." Quoting *Board of Revenue of Mobile County v. Puckett*, 149 So. 850 (Ala. 1933), the Court noted that, "The Legislature (or council) has to a great extent the right to determine the question, and its determination is conclusive when it does not clearly appear to be wrong, assuming that we have a right to differ with them in their finding. Taken on its face, it is our duty to assume that the Legislature (or council) acted within constitutional limits and did not make a donation when such construction is not inconsistent with the recitals of the act." (Parentheses added).

Basically, courts defer to the legislative body's determination that a public purpose exists. A court will overturn this decision, though, if it feels that the stated public purpose is improper or insufficient. For instance, in *Brown v. Longiotti*, 420 So.2d 71 (Ala.1982), the Alabama Supreme Court refused to find that a public purpose existed when the local government wanted to construct a commercial retail facility. The Court held that the sale of the bonds was designed to benefit a private, rather than public, purpose by lowering rents paid by the individual lessees.

**What is a Public Purpose?**

Black's Law Dictionary states that a public purpose "... is synonymous with governmental purpose ... [It] has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents with a given political division ..."

In *Slawson v. Alabama Forestry Commission*, 631 So.2d 953 (Ala.1994), the Alabama Supreme Court stated that, "The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit ... The trend among the modern courts is to give the term 'public purpose' a broad expansive definition."

As McQuillin notes in his treatise on municipal corporations, "What is a public purpose cannot be precisely defined, since it changes to meet new developments and conditions of the times." While it does not have to serve the needs of the municipality as a whole, "Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare." McQuillin, *Municipal Corporations* Section 39.19 (3d Ed. Rev.).

In *Opinion of the Justices No. 269*, the Alabama Supreme Court declined to provide a specific definition, stating, "What is 'a public purpose' depends in part upon the time (age), place, objects to be obtained, modus operandi, economics involved, and countless other attendant circumstances. Generally speaking, however, it has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community."

The Court went on to say that:

> "The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit."
>
> "There is no fixed static definition of 'public purpose.' It is a concept which expands with the march of time. It changes with the changing conditions of our society. What today is not a public purpose may to future generations yet unborn be unquestionably a public purpose. 'Public purpose' is a flexible phrase which expands to meet the needs of a complex society even though the need was unheard of when our State Constitution was adopted."

In *WDW Properties v. Sumter*, 535 S.E.2d 631 (S.C. 2000), the South Carolina Supreme Court pointed out that:

"[A]ll legislative action must serve a public rather than a private purpose. In general, a public purpose has for its objective the promotion of the public health, morals, general welfare, security, prosperity, and contentment of all

the inhabitants or residents within a given political division ... It is a fluid concept which changes with time, place, population, economy and countless other circumstances. It is a reflection of the changing needs of society.

> "Legislation may serve a public purpose even though it (1) benefits some more than others and, (2) results in profit to individuals: Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose merely because some individual makes a profit as a result of the enactment."

The court followed a four-part test to determine when expenditures serve a public purpose:

> "The Court should *first* determine the ultimate goal or benefit to the public intended by the project. *Second*, the Court should analyze whether public or private parties will be the primary beneficiaries. *Third*, the speculative nature of the project must be considered. *Fourth*, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree."

**What is Required?**

Although Section 94 doesn't require passage of a resolution setting out the public purpose to be served, a public agency must still be able to specify the public purpose served by an appropriation to a private group or entity. In some cases, this may require setting out specific findings of fact on the minutes of the meeting that justify the expenditure.

On the other hand, as noted above, in order to comply with Section 94.01, the public entity must pass a resolution at a public meeting stating that the desired use of public funds or materials furthers a public purpose. A notice of the public meeting must be published in the newspaper having the largest circulation in the county or municipality, as the case may be, describing in reasonable detail the action proposed to be taken, a description of the public benefits sought to be achieved by the action, and identifying each individual, firm, corporation, or other business entity to whom or for whose benefit the county or the municipality proposes to lend its credit or grant public funds or thing of value. This notice must be published at least seven days prior to the public meeting.

The action proposed to be taken should be approved at the public meeting of the governing body by a resolution containing a determination by the governing body that the expenditure of public funds for the purpose specified will serve a valid and sufficient public purpose, notwithstanding any incidental benefit accruing to any private entity or entities. At a minimum, then, the governing body should be able to articulate some legitimate, objective public purpose that is furthered by the action. It wouldn't be sufficient to simply state that an expenditure is made "to accomplish a public purpose" without expressly stating the nature of the benefit to the public.

Remember that in *Opinion of the Justices No. 269*, the Alabama Supreme Court stated that the determination of what constitutes a public purpose is within the discretion of the governing body. The Court also noted that the appropriation should be upheld when it is, essentially, consistent with the purpose articulated by the governing body. So, this discretion is not without limits. The governing body must still be able to explain how an appropriation benefits some significant portion of the public, and this public purpose should be in mind before the appropriation is made, rather than articulated after the fact.

***Slawson*, in More Detail**

In *Slawson*, the Alabama Forestry Commission used state personnel and equipment to organize, promote and support a private nonprofit corporation known as the Stewards of Family Farms, Ranches and Forests. The purpose of the Stewards, according to its bylaws, was to promote stewardship among private landowners, to protect landowner's private property rights "by confronting environmental and political extremism in the public and/or political arena," and to develop and implement "a national strategy designed to confront actions which threaten private property rights of family farm, ranch, and forest owners." Stewards opposed certain state and federal laws, such as estate taxation laws and numerous federal environmental laws that it felt interfered with private property rights.

The plaintiffs sued the Forestry Commission, arguing that its support of the Stewards violated Sections 93 and 94 of the Alabama Constitution. The court examined its prior decisions on the public purpose doctrine and then turned its attention to the purpose behind the commission's support of the Stewards. The commission had, by resolution, found that the goals of the Stewards were compatible with the commission's objectives. In its defense, the commission argued:

"All the actions of the Forestry Commission are designed to promote the public good by maintaining healthy forests. One way we do this is by helping private landowners to develop and maintain environmentally healthy and economically sound forests. We are convinced that activities of Stewards of Family Farms, Ranches and Forests will

complement, and in no way conflict with, this mission."

Based on this, and applying what the court acknowledged was a "broad, expansive definition of 'public purpose,'" the Court affirmed the trial court's ruling upholding the appropriations to the Stewards.

**Other Selected Cases and Attorney General's Opinions on Public Purpose**

*Guarisco v. Daphne*, 825 So.2d 750 (Ala.2002), the issuance of warrants to allow a municipality to acquire land to construct a parking lot adjacent to a retail shopping center served a valid public purpose. The Court noted that the general public is not excluded from using the parking lot, so that "persons who shop, eat, or work in the area of the parking lot" could use it. A strong dissent argued that the expenditure did not serve a public purpose because the primary purpose of the expenditure was to benefit the private retail company and its tenants.

*Gober v. Stubbs*, 682 So.2d 430 (Ala. 1996): The fact that a taking of property results in a financial benefit to a private person does not mean that the taking is not for a public purpose.

*Ex parte Birmingham*, 624 So.2d 1018 (Ala.1993): Contract for services of city attorney is a public purpose under Section 94.

*Smith v. Industrial Dev. Bd.*, 455 So.2d 839 (Ala.1984): The Legislature's designation of the acquisition and construction of hotels and motor inns for industrial development as promoting a public purpose is not clearly wrong because these facilities provide incentive for industry and business to locate in or near the municipality.

*Florence v. Williams*, 439 So.2d 83 (Ala.1983): The taking of property for a parking lot where a small number of the spaces will be reserved for the use of a private company while the remaining spaces will be open to the public serves a public purpose.

*Brown v. Longiotti*, 420 So.2d 71 (Ala.1982): A local constitutional amendment did not authorize the municipality to issue revenue bonds to construct a commercial retail establishment. The Court held that the sale of the bonds was designed to benefit a private company not to serve a public purpose.

*Montgomery v. Collins*, 355 So.2d 1111 (Ala.1978): A municipality can justify payment of legal defenses for officials and employees as a public purpose.

*Board Of Revenue & Rd. Com'rs Of Mobile County v. Puckett*, 149 So. 850 (Ala. 1933): A statute appropriating county funds for payment of compensation to a widow for a county employee's death held not unconstitutional as mere donation of public funds to individual without public purpose.

A county commission may appropriate funds to a private organization as long as the funds are used for a public purpose. A contract would ensure proper use of the funds. The private organization would not be subject to the bid law. AGO 1995-112.

The city of Hartselle may donate land or lease land for less than adequate consideration to private businesses only if the city determines that a public purpose is served. The courts have held, as a matter of law, the creation or increase of tax revenues for the city does not serve a public purpose. The city has determined that a public purpose would be served, which is economic stimulation and increased tax and license revenue to fund city services. AGO 2001-187.

A county may not give property to a manufacturing company because the appropriation does not serve a public purpose. AGO 1995-167.

A municipality may convey public property to a nonprofit corporation if there are benefits flowing to both parties which promote a public purpose. AGO 1995-204 and AGO 1998-111.

A county commission may transfer real property to a nonprofit corporation if the commission determines the transfer serves a public purpose. AGO 1995-299.

Conveyance of public property to a private corporation at no cost where there is no public purpose violates Section 94, Constitution of Alabama, 1901. AGO 1995-281.

A county may provide office space to a private, nonprofit corporation if the county determines the corporation serves a public purpose. AGO 1997-097 and AGO 1997-099. **Note:** The League recommends entering into this arrangement only pursuant to a valid contract.

A municipality may not purchase an ad in a souvenir booklet published by a political organization if the ad does not serve a public purpose and the booklet is not a recognized medium of advertising. AGO 1997-220.

A county commission may purchase and renovate a building and lease the building to the Alabama Veterans Museum and Archive if the Commission determines that there is a public purpose for this and that the public purpose is served. AGO 1998-219.

If a municipality determines that the construction of an emergency sand berm on a private beach serves a public purpose, the municipality may contribute public funds to pay part of the cost. AGO 1999-152.

A municipality may convey real property to its

Industrial Development Board for immediate resale at less than fair market value without violating Section 94 of the Alabama Constitution, 1901, if it determines that the conveyance furthers a public purpose. AGO 1999-150.

If a municipal council determines that a public purpose is served, the municipality may appropriate funds to a local children's museum for the renovation of a building located on property leased by the municipality. The municipality may then sublease the building to the museum for a nominal consideration. The Attorney General recommends a written contract permitting this. AGO 2000-071.

If a city determines that stocking a lake owned by the Alabama Power Company will serve a "public purpose," i.e., the promotion of tourism, the city may expend municipal funds for this purpose. The better practice would be for the city to contract with Alabama Power Company regarding the use of the lake. AGO 2000-121

If the municipal governing body finds that appropriating funds to provide expenses for the Homewood High School band to participate in the presidential inaugural parade is a public purpose, the city may expend public funds for this purpose. Whether a contribution by the City of Homewood, to offset the costs of a banquet to honor the Homewood High School football team, is for a public purpose is ultimately a factual determination that can only be made by the city council. AGO 2001-064

If a municipal council determines that an awards banquet will serve a public purpose, the police department may use public funds for the meals of the employees, plaques, seminars and cash awards. Section 11-40-22(b) of the Code of Alabama requires that the governing body of the municipality approve each cash or non-cash award given to an employee for exemplary performance or for innovations that significantly reduce costs. AGO 2001-088.

A city board of education may not purchase flowers for the families of deceased students, public officials, officials' relatives or the general public. Furthermore, the board may not provide refreshments prior to or after a board meeting unless the gathering serves a distinct public purpose. However, the board may generally provide food and nonalcoholic refreshments at a reception to meet applicants for employment and at receptions attended by members of the city government, legislators, and members of the community if the board determines that such expenditure serves a public purpose. AGO 2001-129.

A county commission may contribute to a nonprofit firefighters' organization if the county determines that the contribution serves a public purpose. AGO 2001-270.

A town may not perform work on or repair a water or sewer line that is on private property unless there is legislation that permits such work to be done, the damage constitutes a health hazard, the cost is assessed against the private property owner or the town caused the damage. AGO 2001-188.

Municipal funds may not be expended to provide cake and coffee at monthly meetings of city employees with birthdays in the respective month, even if the work done at these meetings is clearly related to the achievement of one or more municipal purposes. AGO 2002-049.

Whether a city may expend public funds for food and drinks at certain events is a factual determination. If the city council determines that an event serves a public purpose, public funds may be expended by inaugural events, banquets, picnics and other such functions. AGO 2003-049.

If a city determines that cooperation with a private subdivision and any third party contractors in an effort to remove siltation from a private lake would serve a public purpose, a city may contribute funds or in-kind services to the siltation removal effort without violation Section 94, Constitution of Alabama, 1901. AGO 2002-211.

A city may lease municipal property at no charge if a public purpose is served. The city council must determine if a public purpose is to be served by the corporation in leasing the municipal property. AGO 2003-083.

The cost of private cellular telephones used by election officials is not included within the definition of expenses reimbursable by the state, but a county may pay these costs from county funds if the county finds that these are reasonable costs of conducting the election. AGO 2004-058.

If a municipality determines that a public purpose will be served, the municipality may transfer municipal property and adjoining land to a private historical preservation organization by following Section 11-47-20 of the Code of Alabama 1975, relating to the disposition of real property owned by a municipality. AGO 2004-078

If a city determines that an expenditure of municipal funds serves a public purpose, the city may expend municipal funds for the benefit of a nonprofit corporation formed for the purpose of developing, promoting, and protecting the property rights of city citizens, businesses, and other property owners. AGO 2004-147.

If a municipal governing body determines that the expenditure of municipal funds serves a public purpose, it may expend municipal funds for the activities of the Alabama Silver-Haired Legislature. AGO 2004-157.

If a city council determines that expending funds for the acquisition of a monument to memorialize the former existence of a public educational institution serves a public purpose, such expenditure is consistent with Section 94,

as amended by Amendment 558, of the Constitution of Alabama of 1901. AGO 2005-021.

A town may expend public funds to pay for debris and tree removal following a hurricane, even if it involves work on private property, if the town council makes a determination that the work done served a legitimate public purpose. Absent such a finding, the council may assess individual property owners for any cleanup and tree removal performed where the debris constituted a health hazard and where the owners were unable to secure a private source to perform the cleanup service. AGO 2005-029.

The determination of whether a city may expend funds to improve drainage on private property must be made by the city governing body based on whether the improvement will serve a public purpose, and the city must have an easement on the land. A public purpose is served if the expenditure confers a direct public benefit of a reasonably general character, and this must be determined by the governing body on a case-by-case basis. AGO 2005-073.

Under Section 11-3-11(a)(19), Code of Alabama 1975, a county commission can perform industrial development work for a municipality on property owned, leased, or under option to the municipality if the county commission determines the work serves a public purpose. AGO 2006-137.

The appropriation of city funds for the purpose of awarding college scholarships is neither expressly nor impliedly authorized by the state, nor is the authority essential to the operation of the city of Anniston. The city cannot make appropriations directly or indirectly to the Anniston City Schools Foundation for the purpose of awarding college scholarships to graduates of Anniston High School unless the voters in Anniston vote to levy a special tax for a scholarship program and the city council determines such a program would serve a public purpose. AGO 2007-074.

A County Board of Education ("Board") may enter into contractual arrangements with a City ("City") as long as the school board receives fair and adequate consideration for these transactions and the Board determines that its actions serve a public purpose. The City may enter into the contractual arrangements with the Board as long as any funds expended by the City serve a public purpose and the arrangement does not bind future councils. AGO 2008-101.

A Health Care Authority ("Authority") can contract with the governmental entity responsible for maintaining the public road between a Hospital and a Medical Park to widen the road if the Authority's board of directors determines the improvement would accomplish a purpose of the Authority. The Authority can donate property to be used as the location of a senior citizens facility to the City if the property does not constitute a material part of the assets of the Authority and the disposition will not significantly reduce or impair the level of health care services. AGO 2008-115.

Under Section 94.01 of the Alabama Constitution, a town may borrow money and grant public funds to a private corporation or other private entity to aide the corporation with the expense of installing a center turn lane for the purpose of promoting economic development in the town, if the town determines a public purpose will be served. Local Constitutional Amendments may also authorize the expenditure of funds by the town. If public funds are transferred to a private entity, such funds are not subject to Alabama's laws regarding competitive bidding or public works bidding. AGO 2009-086.

A county commission may appropriate funds to a local university, which is a state institution of higher learning, to be utilized in support of its football program, if the commission determines that the appropriation serves to promote economic development within the county. AGO 2010-010.

A municipality, through the operation of its city gas and electric utility department, may institute a voluntary donation program whereby the city helps meet local needs by allowing utility customers the option of donating money through the bill payment process and the city may use these donations to provide funds to the utility department to assist low-income families having difficulty paying their utility bills if the governing body determines that a public purpose is served by such action. AGO 2010-014.

A city may transfer property to an Electrical Cooperative for less than adequate consideration if the city determines that the transfer serves a public purpose. AGO 2010-102 NOTE: The publication and resolution requirements found in Section 94.01 (Amendment 772) of the Alabama Constitution of 1901, may apply.

A municipality, for less than adequate consideration, may convey real property owned by the city to the industrial development board for the board's use for the promotion of industry within the city, if the city council complies with the conditions of section 94.01 (Amendment 772) of the Alabama Constitution, including a determination that a public purpose is served by the transfer. AGO 2011-051.

To determine whether a public purpose is served, the governing body must look to the statutes setting forth the powers of the governmental entity. If within such powers, there exists the authority to promote the action at issue, then the governing body need only decide whether the appropriation will help accomplish that purpose. AGO 2012-002.