



# ELLIS COUNTY AND DISTRICT ATTORNEY

Ellis County Courthouse  
Waxahachie, Texas 75165-3759  
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Joe F. Grubbs

July 9, 1997

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The Honorable Dan Morales  
Attorney General of Texas  
Austin, TX 78711

Opinion Committee

Re: Request for Attorney General's Opinion

**RA-960**

FILE # ML-39663-97

Dear Attorney General Morales:

I.D.# 39663

The following requested Attorney General's opinion is based on these facts:

**Question:**

Can the Ellis County Commissioners Court pay to the Small Business Development Center, a non-profit corporation partially funded by the U.S. Small business Administration and affiliated with Navarro County Community College, the sum of \$7,500.00 per year to partially sponsor and enable the location of a branch of said Development Center and delivery of services by said branch in Ellis County?

**Answer: Yes.**

At first glance this proposed expenditure appears to violate the "golden rule" of spending county tax dollars, that is, Article III, Section 52 of the Texas Constitution which does not permit any County of the State "to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."

Possible exceptions to this constitutional prohibition are Section 381.001 Of the Local Government Code which authorizes the county judge of a county to appoint a county industrial commission, but no such appointments have been made in Ellis County. Section 381.002 of the Local Government Code provides for an election which, if favorably passed, may additionally allow the commissioners court of a county to advertise and promote the growth and development of the county and to spend a reasonable sum of money for personnel, rent, or materials. This type of election has not been held in Ellis County.

The Rains County Attorney posed a similar but different question to you which resulted in you issuing Letter Opinion No. 96-035. In the AG opinion DM 96-035 issued March 29, 1996 in a footnote much is made of the public purpose necessity of the proposed expenditure. In footnote #1 of said opinion it states in part, "Political subdivisions may transfer public funds to private corporations under certain circumstances without running afoul of this constitutional prohibition. As one court has noted in a case involving the transfer of county funds to a private nonprofit corporation, article III, section 52 does not prohibit all such transfers but rather requires that they serve a public purpose and that 'to insure that the political subdivision receives its consideration, viz, accomplishment of the public purpose, the political subdivision must retain some degree of control over the performance of the contract'". *Key v. Commissioners Court*, 727 S. W. 2d 667, 669 (Tex. App.- Texarkana, 1987, no writ) (quoting Mike Willatt, *Constitutional Restrictions on Use of Public Money and Public Credit*, 38 Tex. B.J. 413, 422 (1975)). All transfers of county funds or property to a private entity must satisfy this constitutional test."

Attorney Opinion DM-96-035 further states "article III, section 52-a, adopted in 1987, provides an exception to section 52 of the Texas Constitution providing in pertinent part as follows:

Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purposes, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state.... An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character."

DM 96-035 continues "in attorney General Opinion JM-1227 this office concluded that section 52-a was intended to create exceptions to pre-existing constitutional prohibitions on the lending of public credit by political subdivisions, but also concluded that it 'does not itself expand the authority of [political subdivisions] to lend credit; it merely authorizes the legislature to do so. Consequently, enabling legislation would be necessary to authorize the transaction in question' Attorney

The ultimate question for consideration then is, would Section 381.004 of the Local Government Code provide the exception authorized by Article III Section 52-a of the Texas Constitution to permit such an expenditure as inquired about hereinabove?

Public purpose seems to be critical in the analysis. The program of the Small Business Development Centers (SBDC) in its own program highlight presented to the Commissioners Court describes itself on Exhibit A attached hereto and incorporated herein. Some of the provisions of the "Program" of the SBDC which tend to bring it under 381.004 of the Local Government Code and which are highlighted in the attached exhibit are as follows:

- a. "SBDC's are non-profit, professional agencies funded jointly by the SBA, the local host agency (Navarro College), and other entities promoting Economic Development through the creation and growth of the small business community."
- b. "The goals of the SBDC are to make small businesses (usually 500 or fewer employees) more productive, more profitable, more effectively managed and more fiscally sound."
- c. "Assistance is also available in .... bidding on government Contracts."
- d. "Special attention is given to historically under-utilized businesses and businesses owned by women and minorities."
- e. "During the 12 months ending September 30, 1996, we were part of the economic development tools that brought 107 jobs to Ellis County."

As is pointed out by David Brooks in Texas Practice, Chapter 29.1 an indication of legislative intent in defining "public purpose" is given in the Development Corporation Act of 1979 as amended effective September 1, 1987 where in Art 5190.6 Vernon's Ann. Civ. St., Section 3 it states in part as follows: "It is hereby found, determined, and declared:

- (1) that the present and prospective right to gainful employment and general welfare of the people of this state require as a public purpose the promotion and development of new and expanded business enterprises;
- (2) that the existence, development, and expansion of business, commerce, and industry

are essential to the economic growth of the state and to the full employment, welfare, and prosperity of its citizens;..."

Local government Code Section 381.004 (b) states: "To stimulate business and commercial activity in a county, the commissioners court of the county may develop and administer a program:

- (1) for state or local economic development;
- (2) for small or disadvantaged business development;
- (3) to stimulate, encourage, and develop business location and commercial activity in the county; or
- (4) to improve the extent to which women and minority businesses are awarded county contracts."

To accomplish its purposes permitted under Local Government Code 381.004(b) the Commissioners Court is allowed under Section 381.004(c) to "contract with another entity for the administration of the program, and to use county employees or funds for the program." The SBDC mentioned herein clearly meets the definition of "another entity" as defined in Local Government Code 381.004 (a)(1) since it is a nonprofit organization operating in conjunction with an institution of higher learning.

I pose five questions which are pivotal to the ultimate query considered herein.

1. Is the Article III, Sec. 52 prohibition against donations circumvented by this type of economic development activity? Answer: No, not without other constitutional authority.

2. Is Article III, Sec. 52-a and Sec. 381.004 sufficient authority to bypass this traditional prohibited expenditure? Answer: Yes, assuming Section 381.004 is constitutional.

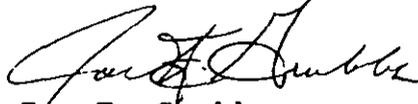
3. Does the proposed expenditure described hereinabove meet the requirements of Article III, Sec. 52-a and Sec. 381.004? Answer: Yes, according to the enclosed "purpose" statement of the Small Business Development Center.

4. Is the requirement of "public purpose" satisfied? Answer: If the activities permitted by commissioners courts in Local Government Code Sec.381.004 and the legislative intent shown in Article 5190.6 Sec. 3(1) and (2) of the Development Corporation Act of 1979 are an adequate definition of "public purpose" then that test is met by this expenditure.

5. Is the "degree of control over the performance of the contract" test mentioned in the *Key v. Commissioners Court* case satisfied? No, unless annual reports to Commissioners at budget time are considered retaining some degree of control.

The only condition which may be lacking to have a lawful expenditure by the Commissioners Court is a sufficient "degree of control over the performance of the contract". The requirement for additional control could easily be met by a more frequent monitoring of the activities and of the accomplishments of the stated and pre-approved goals of the supervised SBDC. As is mentioned in Opinion No. 96-035, the reason stated that control is needed is "to insure that the political subdivision receives its consideration". The stated need for the public to "get its money's worth," can be satisfied by a more diligent scrutiny of the methods, achievements, and productivity of the SBDC by the Commissioners Court. I await your reply. Thank you.

Very truly yours,



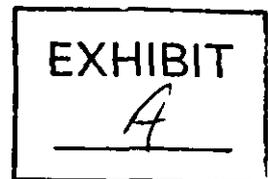
Joe F. Grubbs

cc Yvonne Odom, Ellis County Auditor  
Al Cornelius, Ellis County Judge  
Leon D. Allard, Director - SBA Development Cente

## THE PROGRAM

Small Business Development Centers (SBDC) are located throughout the United States, operated under a cooperative agreement among Universities, Community Colleges and the Small Business Administration (SBA). The Navarro Center is a unit of the North Texas Network, governed by the fiduciary agent, Dallas County Community College District. Our SBA milestones and other economic development agendas are administered by a North Texas Regional Director, operating 13 Development Centers and 3 Specialty Centers throughout the area from Waco to the Red River, and from Ft. Worth to the Louisiana Border covering 49 counties. The Navarro Center Personnel are employees of Navarro College and our day-to-day activities reflect the character and commitment of the College and the Program.

~~SBDC's are non-profit, professional agencies funded jointly by the SBA, the local host agency, Navarro College, and other entities promoting Economic Development through the creation and growth of the small business community. The goals of the SBDC are to make small businesses (usually 500 employees or less) more productive, more profitable, more effectively managed, and more fiscally sound.~~ This confidential help is available for those who may be starting a new business or to those who may have been in business a number of years. These services include assistance with accounting/bookkeeping, financial analysis, personnel management,



advertising/marketing, inventory control, budget forecasting, employee training, etc. Assistance is also available in importing/exporting, bidding on Government Contracts, and Technology Assistance in Patents and Copyrights. Special attention is given to historically under-utilized businesses and businesses owned by women and minorities.

We achieve our goals through counseling, continuing education, and referrals. Financial assistance to the business owner is acquired from local lending sources with SBA guarantee support.

Free counseling is provided by experienced, knowledgeable professionals, either in the SBDC Office or at the place of business. Subjects covered can include the "How-to's" of business start-up, marketing and market research, cash flow analysis, capital needs, production and inventory control, and personnel management. The business can be engaged in wholesale, resale, manufacturing, or service delivery.

Many of our SBDC workshops are free of charge. Every effort is made to keep fees, if any, to a minimum. We work with professionals in business, trade associations, and colleges and universities to provide expert instruction on specific and general business subjects. Courses range from advanced seminars for the experienced business owner/operator to introductory courses for those planning to start a new business.

Through interaction within the communities involved, we maintain a resource list of qualified, reliable, and experienced

professionals who can be called upon as consultants paid for by SBDC funding. These professionals may address the longer term, more intensive and more highly specialized assistance, such as computer software, the Internet and ISO 9000.

A variety of lending programs are available to qualified borrowers through local and regional participating lenders. Loans, ranging up to \$750,000 can carry an SBA guarantee of up to 75%. The rates are competitive with those available for this type of borrower, and the repayment terms may be extended somewhat compared to conventional loans. We assist not only in the paperwork completion, but also in providing guidance in the preparation of the Business Plan and acting as a vehicle to perfect the presentation. In this regard, we hope to take to the bank a better prepared borrower or, in some cases, challenge the plan sufficiently to expose the risks that could jeopardize precious equity.

#### CURRENT OPERATIONS

The Navarro SBDC main office is housed in the Corsicana Chamber of Commerce Building. Office space for the Director and Secretary plus training facilities are provided as an "In-Kind" contribution necessary as part of the Federal Grant (to be further amplified later in the funding section). We also have a satellite office in Waxahachie at the Navarro College Campus. Our Training

Director for the region, is located at Waxahachie. The office is open from 8:00 a.m. to 5:00 p.m. five days per week. Regularly scheduled events occur on Thursday, however, private counseling can be received at any time with adequate reservation notice.

Personal counseling, Small Business related workshops and seminars are conducted throughout the region utilizing space contributed by Navarro College Ellis County Campus, the various Chambers and in some cases local lending institutions. A summary of our activities follows:

	Act. 6 Months <u>@ 3/31/96</u>	Act. 6 Months <u>@ 3/31/97</u>	Est. 12 Months <u>@ 9/30/97</u>
Counseling Sessions	61	75	<u>150</u>
# of hours	315.8	235.0	450
# of hours/session	5.08	3.13	3.0
Minority Owned	14	13	30
Women Owned	21	36	75
Capital Raised	\$1.8 MLN	3.3 MLN	5.0 MLN
Training/Workshops	26	26	55
# of Attendees	182	256	550
Minority Owned	21	12	10
Women Owned	85	130	250

For the six months period ending 3/31/97, Ellis County office conseled 17 clients, held 12 seminars with 152 attendees, raised \$1,230,000.00 in SBA guaranteed capital. Based on a factor

accepted by the SBA, we have assisted Ellis County businesses create or retain 41 jobs for 6 months in FY 97. During the 12 months ending September 30, 1996, we were part of the economic development tools that brought 107 jobs to Ellis County.

We continue to build our library to include a complete inventory of SBA/Score produced pamphlets on a multitude of related small business subjects, workbooks authored by Entrepreneur Magazine outlining requirements for specific business fields, workshop manuals for extended session training on all aspects of writing business plans and funding requests, and a variety of video tapes and other related materials. This library grows as money is available above normal operating requirements; a significant portion of the library is housed at Waxahachie, but all is available to the County.

We also can have access by computer to a number of data bases to search the Texas Department of Commerce's Texas One Market Place, Access to the Internet provides research and marketing opportunities limited only by the client's patience, initiative and imagination. A new General Services Administration (GSA) Mini-store is currently being added to the Navarro SBDC and should be operational by July 1, 1997. This will allow direct "on-line" communication with the Procurement activities of the District GSA Office.

## FUNDING

The Federal funding formula requires their grant monies be matched 50% with cash and 50% with "In-Kind" services. The "In-Kind" services include facilities for office and training, equipment, supplies, and counseling hours by volunteers, all valued at reasonable market rates. In the past we have received \$52,000/year under this grant. Future funding is contingent on continued Legislative support, but we anticipate level funding for FY '98.

State funds received do not require a matching amount. During 1997, we received \$26,700 from the State of Texas and anticipate level funding for next year.

Navarro College has contributed approximately \$20,000 annually. Future contributions will depend upon available funds.

Last year, the Ellis County Commissioners Court agreed to provide to Navarro SBDC \$7,500. We anticipate this commitment to be funded during June 1997. Our annual grant application and budgeting process requires firm commitments toward our matching the Federal contribution. Without this firm commitment prior to the contract year starting October 1, 1997, we must spend according to a substantially reduced budget and program eliminating the on-site effort for Ellis County.

THE PROPOSAL

This budget request is for \$7,500 for the period 10/1/97 through 9/30/98; no increase requested. Commitments made prior to 10/31/97 can be funded during calendar year 1998. Failure to fund our matching obligation reduces the Federal Funding Share by \$15,000 and jeopardizes the State funding for training, currently at \$26,700. A portion of the State funds are used to fully fund the Ellis County Center.

affidavit, determines that probable cause exists, and issues an arrest warrant.

The defendant is subsequently arrested and taken "without unnecessary delay" to a magistrate (a municipal judge) who performs his duties pursuant to art. 15.17 including the setting of bail. This process is technically called having the defendant "magistratized". See Watson v. State, 762 S.W.2d 591, 594 n.4 (Tex.Crim.App. 1988).

The defendant is then jailed but contacts a bonding company who accepts him as a customer, issues a bond, and has the defendant released from custody.

One week passes and the case is referred to the district attorney for review. The D.A. requests additional investigation before making a decision as to whether the case will be referred to the grand jury.

During this time frame, the bondsman formulates the belief that the defendant is a flight risk. Consequently, he wishes to surrender the defendant/principal by utilizing the procedure set forth in art. 17.19, and he prepares an affidavit setting forth the reasons he believes constitutes just "cause". Since the statute reads the affidavit should be filed "before the court or magistrate before which the prosecution is pending", he calls the district clerk who informs him that no indictment has been filed against the defendant. Consequently, the bondsman needs to make a determination of where the "prosecution is pending" in order to file the affidavit.

#### DISCUSSION

The options, as set forth above, seem to be three-fold. The least likely choice would appear to be the presentation of the affidavit to surrender the principal to the district judge even though the judge would ultimately have jurisdiction over the case upon return of an indictment. In Ex Parte Clear, 573 S.W.2d 224 (Tex.Crim.App. 1978) the Court of Criminal Appeals held that a district court had no authority to increase a bond amount previously set by a justice of the peace because the justice court "had sole jurisdiction over [the] complaint against relator, to the exclusion of all other courts, until such time that the complaint was either dismissed by the court or superseded by the action of the grand jury, or until the time [the right to indictment was waived]." Id. at 229. This reasoning would support the conclusion that the prosecution was not "pending" before the district court in the above hypothetical. Additionally, a different conclusion would be impractical in a multi-district court county since it would be impossible to predict which court the indictment would ultimately be filed in.

With the district court eliminated, the remaining choices would be

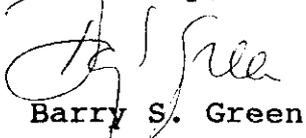
Magistrate # 1 (who issued the warrant) and Magistrate # 2 (who "magistratized" the defendant). Before which of these magistrates is the case pending as that term is defined in article 17.19 of the Texas Code of Criminal Procedure? *This question is respectfully submitted for your review.*

The appropriate location to file the affidavit, it would appear, would be with Magistrate # 1 especially when considering the language of Clear, supra. From a practical standpoint, however, there might be some difficulty in the bondman identifying the correct magistrate in such a scenerio especially in light of the number of officials who are designated as magistrates. See Code of Criminal Procedure art. 2.09. Nevertheless, such difficulties, I concede, have no place in statutory interpretation.

However that question may ultimately be answered, does the result change if the arrest was made without the benefit of a warrant? I would opine that the magistrate which "magistratized" the defendant would be the only individual who could receive the affidavit. Although the Code of Criminal Procedure is silent on the subject, there is no question that an affidavit prepared by the arresting officer should be filed with a magistrate after the arrest which the judge should review to determine whether probable cause exists to hold the defendant pursuant to Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct 854, 43 L.Ed.2d 54 (1975). See also, Cantu v. State, 842 S.W.2d 667, 680 n.10 (Tex.Crim.App. 1992).<sup>1</sup> This document could be characterized as the equivalent of a pre-arrest "complaint".<sup>2</sup> Therefore, the reasoning would be consistent with that set forth above in arrest warrant situations.

Thank you for your assistance in this matter.

Sincerely,



Barry S. Green

cc: Sheriff Phil Ryan  
All Justices of the Peace

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<sup>1</sup> This is typically filed with the magistrate who will magistratize the defendant, but their appears to be no requirement for same.

<sup>2</sup> Although the process is not uniform around the state, some officers will file a very short complaint form in addition to the probable cause affidavit. The form is described in Rule v. State, 890 S.W.2d 158, 166 (Tex.App. - Texarkana 1994, pet. ref'd) wherein it was improperly used as a complaint under article 15.04.