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OPEN RECORDS DIVISION

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

RQ-0602-JC

Don A. Gilbert, M.B.A.
COMMISSIONER

August 23, 2002

INTERAGENCY MAIL

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-42775-02

I.D. # 42775

Re: Request for Attorney General's Opinion Regarding Administration of the Texas Community Health Center Revolving Loan Fund and Related Questions

Dear General Cornyn:

On behalf of the Health and Human Services Commission (HHSC), I request your opinion concerning the following questions:

- (1) May the Community Health Centers Revolving Loan Fund authorized by chapter 136, Human Resources Code¹, or any of its components exist or function as trust funds outside of the treasury, or alternatively, in a manner consistent with the intent of chapter 136?
- (2) Does chapter 136 establish a sufficient public purpose to support the lending of public funds as contemplated in the statute and in compliance with the provision of Article III, sections 50 and 51 of the constitution?
- (3) Assuming question 2 above is answered in the affirmative, does chapter 136 supply adequate controls to ensure the fulfillment of the public purpose consistent with sections 50 and 51 of Article III?
- (4) Does chapter 136 represent a prohibited private delegation of authority under Article II, section 1 of the constitution?
- (5) Are the provisions of chapter 136 regarding the ownership of loan income irreconcilably in conflict?

The following paragraphs comprise our brief of the legal issues.

¹ As added by House Bill No. 2574, Acts 2001, 77th Leg., ch. 878, R.S., at 1658.

I. BACKGROUND

A. House Bill 2574

On May 23, 2001, the 77th Texas Legislature enacted House Bill 2574, effective September 1, 2001.² The bill adds chapter 136 to the Texas Human Resources Code. Its stated purpose is to establish the Texas Community Health Center Revolving Loan Fund, a “trust outside of the state treasury held by a financial institution and administered by the commission as a trustee on behalf of community health centers in the state.”³ The loan fund is composed of:

- (1) money appropriated to the fund by the legislature;
- (2) gifts or grants received from public or private sources; and
- (3) income from other money in the fund.⁴

Section 136.004 directs HHSC to contract with a nonprofit “development corporation” to carry out the chapter’s purposes. It also provides that HHSC shall adopt rules to administer the chapter, including rules that require:

- (1) HHSC to review the development corporation’s lending and servicing practices to ensure conformity with generally accepted accounting principles;
- (2) Eligible community health centers to enter into agreements with the development corporation stating the terms of the loan;
- (3) The development corporation to provide HHSC with semiannual reports giving details of each loan’s status;
- (4) The development corporation to require annual audits of community health centers receiving loans under the program; and
- (5) HHSC to provide oversight of the development corporation for loan guarantees from federal and state programs.⁵

Section 136.006(a) provides that the selected development corporation’s investment committee, consisting of seven community members, must approve all of the development corporation’s loan decisions. In addition, §136.009(b)(1) authorizes the development corporation to make grants “from other money received from the fund and that was derived from a legislative appropriation,” provided it complies with HHSC’s administrative rules.

Finally, §136.008 provides that all “income received on a loan made with money received under the program is the property of the development corporation. Income received on a

² Acts 2001, 77th Leg., ch. 878, R.S., at 1658.

³ TEX. HUM. RES. CODE §136.003(a) (Vernon 2002).

⁴ *Id.* at §136.003(b).

⁵ *See id.* at §136.009(a).

loan includes the payment of interest by a borrower and the administrative fees assessed by the development corporation.”

B. House Bill 3088

Two days after enacting HB 2574, the 77th Texas Legislature enacted House Bill 3088, the Funds Consolidation Bill.⁶ Section 2 of this “clean up” bill provides:

SECTION 2. ABOLITION OF FUNDS, ACCOUNTS, AND DEDICATIONS. Except as otherwise specifically provided by this act, all funds and accounts created or re-created in the state treasury by an Act of the 77th Legislature, Regular Session, 2001, that became law, and all dedications or redirections of revenue in the state treasury or otherwise collected by a state agency for a particular purpose by an Act of the 77th Legislature, Regular Session, 2001, that becomes law, are abolished on the later of August 27, 2001, or the date the Act creating or recreating the fund or account to dedicating or redirecting revenue takes effect.⁷

Section 8 of the Funds Consolidation Bill applies to trust funds. It provides the following in pertinent part:

SECTION 8. TRUST FUNDS. (a) Section 2 of this Act does not apply to trust funds or dedicated revenue deposited to trust funds created under an Act of the 77th Legislature, Regular Session, 2001, except that the trust funds shall be held in the state treasury, with the comptroller in trust, or outside the state treasury with the comptroller’s approval.

....

(d) Notwithstanding *Subsection (a) of this section, Section 2 of this Act applies to the community health center revolving loan fund created by House Bill No. 2574 and to revenue dedicated to the fund.*⁸

Thus, while trust funds are generally exempted from abolishment under Section 2, Section 8(d) specifically applies Section 2 to the Community Health Center Revolving Loan Fund and any revenue dedicated to the fund. Thus, the Funds Consolidation Bill apparently sweeps these funds into the state treasury’s general revenue fund.

⁶ Acts 2001, 77th Leg., ch. 1466, at 4921.

⁷ *Id.* §2.

⁸ *Id.* §8(a), (d) (emphasis added).

II. ANALYSIS

A. *Trust outside of the State Treasury*

As set forth above, although House Bill 2574 established the Community Health Center Revolving Loan Fund as a trust outside of the state treasury, House Bill 3088 apparently swept the loan fund and its proceeds back into the state treasury.

The Code Construction Act deals with the construction of irreconcilable statutes. It provides that if statutes enacted in the same legislative session cannot be reconciled, the statute with the latest date of enactment prevails.⁹ The "date of enactment" is the last day the Texas Legislature voted on the bill.¹⁰ Because the 77th Texas Legislature enacted House Bill 3088 two days after House Bill 2574, House Bill 3088's provisions apparently prevail. Given this fact, it appears HHSC may be unable to administer the Community Health Center Revolving Loan Fund as a trust outside of the state treasury or in a manner consistent with House Bill 2574's directives.

B. *Constitutional Issues*

1. Prohibitions related to the lending of the State's credit.

Article 3, Sections 50 and 51 of the Texas Constitution generally prohibit the state from granting, lending or pledging state money or credit to private entities unless the transfer serves a public purpose and adequate governmental controls are in place.¹¹ Similarly, Article 16, Section 6 of the Texas Constitution prohibits the appropriation of funds for private purposes.

HHSC requests your opinion on whether the HB 2574's enumerated purpose, as set forth in §136.001 of the Human Resources Code, sufficiently establishes a public purpose. In addition, HHSC requests your guidance on the second prong of the public purpose test: whether the statute contemplates adequate governmental controls over the funds. As mentioned above, the statute directs HHSC to enact administrative rules to administer the chapter, yet appears to grant the third party development corporation the final decision-making authority over all loans and grants to community health centers.

2. Delegation of legislative authority.

The transfer of loan authority to the development corporation raises an additional constitutional issue: Whether this delegation of authority violates the separation of powers doctrine set forth in Article 2, Section 1 of the Texas Constitution. The separation of powers doctrine prohibits the Texas Legislature from granting broad delegations of authority to private

⁹ TEX. GOV'T CODE §311.025(a) (Vernon 1998).

¹⁰ *Id.* at §311.025(d).

¹¹ See Attorney General Opinion H-1309 at p.4 (1978); Attorney General Opinion JM-1229 at pp. 6234-36 (1990) (citing *Brazoria County v. Perry*, 537 S.W.2d 89 (Tex. Civ. App. – Houston [1st Dist.] 1976, no writ)).

entities.¹² To determine whether a private delegation of authority is appropriate, the Texas Supreme Court has considered the following factors:

- (1) Are the private entity's actions subject to meaningful review by the government;
- (2) Are the persons affected by the private delegate's actions adequately represented in the decision making process;
- (3) Does the entity have pecuniary or personal interest that may conflict with the public function;
- (4) Is the delegation narrow in duration, extent and subject matter;
- (5) Does the entity possess special qualifications; and
- (6) Has the Legislature provided standards to guide the entity?

See id. at 472. HHSC requests your opinion on whether chapter 136's delegation of authority to the development corporation complies with these factors or whether HHSC may remedy any potential constitutional shortcomings in the statute by administrative rule.

A strict reading of chapter 136 appears to require the following answers to the Supreme Court's questions:

- (1) The statute does not clearly appear to provide for meaningful review by HHSC of the loan development corporation's loan decisions or other potential transactions the loan development corporation may take with the public funds that comprise the trust.
- (2) The statute does not appear to provide clear guidance on the level of representation, if any, of the parties affected by the loan development corporation's decisions. In this instance, the statute does not provide for either a loan applicant's representation in the lending process (though this potentially may be cured by operation of federal lending laws) or HHSC's participation (beyond the administrative rule making process) in the development of policy that affects loan decisions.
- (3) The development corporation's ownership of loan proceeds appears to create a pecuniary interest in the management of the public funds deposited in the trust. It is not clear, however, whether this fact alone is sufficient to establish a conflict with the state's interests in the administration of public funds.
- (4) On its face, the statute does not appear to limit the duration of the delegation to the development corporation.

¹² *Texas Boll Weevil Eradication Fnd. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997).

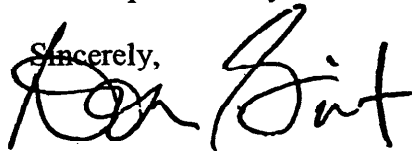
- (5) It is unclear whether the statutory provisions covering the selection criteria for the development corporation¹³ establish the "special qualifications" needed for the fund administrator.
- (6) The statute on its face does not appear to provide standards to regulate the development corporation's actions.

C. Ownership of Loan Proceeds

Finally, HHSC asks you to address a potential conflict between §136.003(b)(3) and §136.008 of the bill. Section 136.003(b) provides that the trust fund will be composed of appropriated money, gifts or grants from public and private sources, and income from other money in the fund.¹⁴ HHSC interprets "other money in the fund" to include the proceeds from loans to community health centers. Section 136.008, on the other hand, provides that all income "received on a loan made with money received under the program is the property of the development corporation."¹⁵ This includes "the payment of interest by a borrower and the administrative fees assessed by the development corporation."¹⁶ If this grant does not violate the Texas Constitution's "public purpose" provisions, can these sections be reconciled?

Thank you for your consideration of this request. Please feel free to contact my office if we can provide any additional information regarding the issues presented.

Sincerely,



Don A. Gilbert

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¹³ HUM. RES. CODE §§136.002(3), 136.004, 136.005 (Vernon 2002).

¹⁴ HUM. RES. CODE §136.003(b) (Vernon 2002).

¹⁵ *Id.* at §136.008.

¹⁶ *Id.*