

January 9, 2019

RQ-0266-KP

Office of the Attorney General, State of Texas
Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-48482-19
I.D. # 48482

RE: Whether there are any duration or amount limitations for agreements for loans and grants under Local Government Code Chapter 381

Dear General Paxton:

This request is submitted as the Chairman of the House Committee on County Affairs. Chapter 381, Local Government Code authorizes loans and grants of county funds for economic development programs. Texas counties are receiving applications for such loans and grants for extended durations, exceeding the 10-year limitation on tax abatement agreements. Counties need a determination of the limitations, if any, on such loans and grants.

What constitutional and statutory limitations, if any, apply to the duration and extent of economic development loans and grants by a county under Chapter 381, Local Government Code?

An agreement under Chapter 381 must comply with:

- A. Article III, Sections 52(a) and 52-a of the Texas Constitution, which prohibits a county lending its credit to a private entity and requires that all county expenditures fulfill a public purpose.
- B. Texas Government Code Section 381.004, which allows a county to issue grants for certain purposes. Grants provided under section 381 must also comply with the Texas Constitution.

A. Article III, Sections 52(a) and 52-a

All sections of 381.004 and any agreement must comply with Art. III, Sec. 52(a) and 52-a of the Texas Constitution. Article III, Section 52(a) states, in part:

(a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision 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 [....]

Article III, Section 52-a states:

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 purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state.

Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section, and that are payable from ad valorem taxes, must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue.

[However] A program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character.

Tex. Const. art. III, §52-a. Section 52-a provides the legislative authority for Local Government Code Chapter 381. Section 52-a requires a bond election if bonds are sold which are secured by tax revenue. However, if the loan or grant is not secured by tax revenue and is payable solely from current revenue, it is not a "debt" and no bond election vote is required. Therefore, an agreement can qualify under Article III, Section 52-a of the Texas Constitution if the requirements of Section 52(a) are met, provided that the grants are payable from revenues derived from the current fiscal year or accumulated reserves.

The Texas Supreme Court has determined that section 52(a) does not prohibit payments to individuals, corporations, or associations if such payments: (1) serve a legitimate public purpose; and (2) afford a clear public benefit received in return. *See Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex.1972). The Constitution does not invalidate an expenditure which incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose. *Brazoria County v. Perry*, 537 S.W.2d 89, 91 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).

The Court set out a three-part test to determine if an expense constitutes a public purpose: (1) the predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) the public retains control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) the expense ensures that the political subdivision receives a return benefit. *Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Com'n*,

74 S.W.3d 377, 383–84 (Tex. 2002). The initial determination of whether a particular expenditure satisfies the three-part test is the responsibility of the Commissioners Court, subject to judicial review for an abuse of discretion. Tex. Att’y Gen Op. No. KP-0091.

B. Texas Government Code Section 381.004

Prior to 2001, counties were not authorized to provide economic development grants to a private company under Section 381.004 of the Local Government Code. Tex. Att’y Gen. Op. No. JC-0092 (1999). In 2001, the Legislature amended Section 381.004 to allow counties to provide grants. *See* Tex. Loc. Gov’t Code Ann. § 381.004(h) (West).

Section 381.004(h) states, “The commissioners court may develop and administer a program authorized by Subsection (b) for making loans and grants of public money and providing personnel and services of the county.” *Id.* 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;
- (4) to promote or advertise the county and its vicinity or conduct a solicitation program to attract conventions, visitors, and businesses;
- (5) to improve the extent to which women and minority businesses are awarded county contracts;
- (6) to support comprehensive literacy programs for the benefit of county residents; or
- (7) for the encouragement, promotion, improvement, and application of the arts.

Tex. Loc. Gov’t Code Ann. § 381.004(b). Subsection (3) gives counties broad capacity to contract with the state, a city or other local government, or any private entity in order to “stimulate, encourage, and develop business location and commercial activity in the county.” 36 Tex. Prac., County and Special District Law § 29.4 (2d ed.).

Attorney General Opinion JC-0092 discussed whether a county could enter into a grant program under Chapter 381. Tex. Att’y Gen. Op. No. JC-0092. In that opinion, Dallas County entered into a grant agreement with a private company and the Attorney General ruled that Section 381.004 of the Local Government Code did not authorize a county to enter into the agreement. However, that opinion was written prior to the addition of Section 381.004(h), cited above. The addition of subsection (h) would appear to supplant Attorney General Opinion JC-0092, but the Texas Attorney General’s website still lists the opinion as valid. There are no other cases or other Attorney General opinions that discuss 381.004(h) and how to apply it to particular programs or projects.

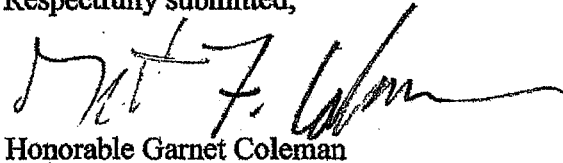
C. Tax Code Chapter 312:

Section 381.004(g) states the "execution, duration, and other terms of the agreement are governed, to the extent practicable, by the provisions of Sections 312.204, 312.205, and 312.211, Tax Code, as if the commissioners court were a governing body of a municipality." Tex. Loc. Gov't Code § 381.004(g). These sections of the Tax Code discuss tax abatement agreements and limit such agreements to 10 years. Section 381.004(h), which authorizes loans and grants, does not specifically reference the 10-year limitation.

D. Questions:

Does the reference to the 10-year limitation in Chapter 312 in Section 381.004(g) limit Chapter 381 loan and grant agreements under Section 381.004(h) to 10 years or less? If not, what limitations in amount or duration, if any, apply to loan and grant agreements under Section 381.004(h)?

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Garnet Coleman", is written over the typed name.

Honorable Garnet Coleman

JPA/pba