MEMORANDUM

FROM: Sid Hemsley, MTAS Senior Law Consultant

DATE: January 22, 2002 (updated 8/7/2018)

RE: Municipal Work on Private Property

You have the following question, supported by the accompanying facts:

Does the lending of credit statute prohibit cities from financing improvement[s] for its citizens? For example, five citizens on a street need substantial work on a ditch behind their house[s]. The city will provide the labor for the work if the citizens provide the materials. Actually, we provide the material, to be sure it is the proper material, and have the citizen reimburse us. We have an AG opinion that the providing of labor is OK. But in some cases the materials are several thousand dollars and citizens ask if they can pay over three to five years.

I do not have enough facts to answer that question, for this reason: There are two provisions of Article II, § 29 of the Tennessee Constitution that apply to your question, and they are dependent upon each other.

- The prohibition on the lending of credit "statute" of which you speak is actually a prohibition contained in Article II, § 29, of the Tennessee Constitution, which provides that "...the credit of no County or City shall be given or loaned to or in the aid of any person, company, association or corporation except upon an election [of the voters and approved by a 3/4 vote.]

- However, Article II, § 29 of the Tennessee Constitution, also provides that "The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively..." [Emphasis is mine.]

The threshold question with respect to the proposed street improvement is whether it is even authorized under the "corporate purpose" provision of Article II, § 29.

You point to a Tennessee Attorney General's opinion that authorizes the city's labor on the property in question. I am not sure to which TAG opinion you refer. TAG opinion 98-101 opines that the expenditure of municipal funds under what became Public Acts 1998, Chapter 1043, and which was codified as Tennessee Code Annotated, § 58-2-625, qualifies as a public purpose. That statute was subsequently repealed (probably by accident) and resurrected by Public Acts 2001, Chapter 263, and which was codified as Tennessee Code Annotated, § 58-2-111(c)(10). Tennessee Code Annotated § 58-2-111 was also repealed, and the pertinent language was moved to Tennessee Code Annotated § 7-51-1601.

It provides that:

(a) As used in this section, unless the context otherwise requires:

(1) “Natural disaster” means a disaster that has caused widespread devastation in an area and includes an area that has been declared by the governor to be a disaster area; and

(2) “Private residential property” means real property, and the improvements to such real property, that is not owned by the federal government or a state agency and is used as a dwelling.

(b) When a natural disaster occurs, a municipality or county shall have access to and may spend public funds to assist in cleaning up debris and fallen trees on private residential property, if a request is made by the owner of the property for such assistance.

(c) The municipality or county shall by ordinance or resolution, as appropriate, adopt a plan for providing assistance for natural disaster relief to private residential property as authorized by this section. A county highway department may perform work as part of a plan adopted under this subsection (c) if the plan specifically authorizes the county highway department to perform the work and the plan provides for the reimbursement of the costs incurred by the county highway department.

That statute has a narrow application: to the clean-up of trees and debris on the property of low income or disabled homeowners, and only following natural disasters. [The irony of that statute is that it probably was–and perhaps still is--within the police powers of municipalities to do such work on private property of all it citizens following natural disasters]. Even if the homeowners contemplated by your question qualify for assistance under that statute, the work of improving a ditch on their property is not contemplated under that statute.

I know of no other TAG opinion that addresses the question of whether it is legal for municipalities to give private property owners assistance in the improvement of their ditches.

Undoubtedly, there are conditions under which in the exercise of its police powers a municipality can provide such assistance, such as where the ditch in question poses a threat to the municipality’s streets or to other municipal property. Where the city has acquired a drainage easement in a ditch it can also make drainage improvements, but generally in such cases the municipality, not the property owner, would be responsible for the cost of their installation.

The reason the question of whether the municipality’s assistance to the homeowners meets the “corporation purpose” requirement of Article II, § 29 of the Tennessee Constitution, is that Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga, 580 S.W.2d 322 (1979), says that, “Likewise, the prohibition relative to the extension of credit by a city or county to or in aid of any company, association or corporation under article II, § 29 must be qualified by the “public purpose” criterion.” [At 329] Of course, under Article II, § 29, that same rule applies to the extension of credit to any “person” as well as any company, association or corporation; Chattanooga-Hamilton County Hospital Authority simply did not involve a person.

That case cited for support West v. Tennessee Housing Development Agency, 512 S.W.2d 275 (1974), in which the Tennessee Supreme Court interpreted a similar lending of credit prohibition that applies to the state under Article II, § 31 of the Tennessee Constitution:

Again, it appears that the provision of Article 2, § 31, has been qualified by the “public purpose” criterion. The question was authoritatively dealt with by our Supreme Court in Bedford County Hospital v. Browning, 180 Tenn. 227, 225 S.W.2d 41 (1949), where the Court concluded that the giving of the

state's credit for non-public purposes only was prohibited by Article 2, § 31. Discussing this section the Court noted as follows:

"'The obvious purpose of this Section of our Constitution was to prevent the State from using its credit as a gratuity or donation to any person, corporation, or municipality. It is further obvious that it was not designed to prevent the State from using its credit to aid persons, corporations, or municipalities if required to accomplish a State or public purpose, or to fulfill a State duty or obligation under its police powers. Under the authorization, the Legislature and not the courts is the exclusive judge of manner, means, agencies and methods to meet and fulfil these purposes.'" [At 284]

The Tennessee General Assembly, having declared that municipal assistance to low income and disabled property owners following natural disasters is a public purpose, is probably conclusive under Tennessee Code Annotated § 7-51-1601. If the project proposed by the City of Jackson meets the requirements of that statute, the "front end" financing of that project by the city would not appear to violate the lending of credit prohibition in Article II, § 29 of the Tennessee Constitution.

If the proposed project does not conform to Tennessee Code Annotated § 7-51-1601, it must meet the "corporation purpose" test of Article II, § 29 under some other statute or legal theory. If a corporation purpose cannot be found, the city cannot spend money on the project, let alone extend credit to finance homeowners' payment of its cost.

I cannot improve upon the definition of what is "public purpose" given in TAG 98-101 and TAG 99-097. In the latter opinion, it is opined that the expenditure by a municipality on private roads leading to cemeteries serves a public purpose. I have enclosed a copy of those opinions. TAG 97-097 points to M'Callie v. Mayor of Chattanooga, 40 Tenn. 318 (1959) for the proposition that a city governing body's judgment that an expenditure is for a public purpose is prima facie evidence of that fact. But what the Court said in total on that subject is worth quoting:

Every attempt to lay down an exact general rule, by which to determine what is a "corporation purpose" must prove nugatory. The question must be decided on the facts of each particular case. And while we do not mean to say that the judgment of the local government of the town is to be taken as conclusive of the question whether the object proposed be a legitimate corporation purpose, yet, we think it might, in general, be safely taken as prima facie evidence of that fact; for it will perhaps be found, in most cases, that an intelligent board of aldermen are more capable of forming a correct judgment, as to which measures are of a nature to promote, more or less directly, the general interests and prosperity of the town, than any other tribunal. [At 33–32]

The problem with carrying that language too far, is that a municipality's conclusion that a particular expenditure is for corporation purpose is not conclusive. Indeed, TAG 84-166, citing Article II, § 29, of the Tennessee Constitution, opines that generally work by a county or a municipality on private property is generally not a public purpose, and is therefore not authorized. That opinion should be read in connection with TAG 98-101, or any other TAG opinion of which I may not be aware that in some respects puts its imprimatur on municipal work on private property. TAG 98-101 is distinguished by the fact that a state statute authorized the removal of trees and the cleaning of debris on the property of low income and disabled homeowners, following a natural disaster, was a public purpose. I am not aware of any statute that does the same for ditch improvements on private property.

Let me add here that Tennessee follows the natural flow rule with respect to drainage. Ordinarily, a municipality is not liable for drainage problems that occur in watercourses that pass through private land, unless it has made drainage installations that disturb the natural flow and where that disturbance causes damage. That is true even where the municipality has done no more than enter a private watercourse and cleaned out leaves that disturb the flow. [Slatten v. Mitchell, 124 S.W.2d 310 (1938); Dixon v. Nashville, 320 S.W.2d 178 (1976); Miller v. City of Brentwood, 548 S.W.2d 878 (1977); Butts v. City of South Fulton, 565 S.W.2d 879 (Tenn. App. 1978); Yates v. Metropolitan Government of Nashville & Davidson County, 451 S.W.2d 437 (1969).] If the city provides the labor and materials (according to the facts, to insure that the materials meet city specifications), the city may be taking upon itself considerable liability for any drainage problems caused by their installation.