1984 WL 185482 (Utah A.G.)

Office of the Attorney General

State of Utah
Informal Opinion No. 84–80
December 3, 1984

***1** Mr. Buzz Hunt
Chairman
Permanent Community Impact Fund
6233 State Office Building
Salt Lake City, Utah 84114

Dear Mr. Hunt:
Your letter dated October 26, 1984, requesting an opinion as to whether the Permanent Community Impact Fund Board can grant or loan money for construction of a public golf course on land not owned by Ferron City although negotiations are presently underway to acquire the land, has been referred to me for response.

Section 63–52–3, Utah Code Annotated 1953, as amended, authorizes the impact board to make grants and loans to communities socially or economically impacted by mineral resource development for '(c)onstruction and maintenance of public facilities' among other things. This use of public funds must be measured in light of Article VI, § 29, Utah Constitution, which prohibits the legislature from authorizing the State of any political subdivision to lend its credit to any private individual or corporate enterprise or undertaking. In a letter opinion from this office to the Cache County Attorney dated September 20, 1978, it was concluded that the use of county funds and equipment to provide terracing and improvements to private land for a demonstration project on new farm technology, would constitute an expenditure of public funds for private purposes in violation of the foregoing constitutional provision. A copy of that opinion is herewith enclosed. For the same reasons set forth therein, it would be an unconstitutional use of public funds to construct a golf course on privately owned land.

Your opinion request recognizes the necessity of using impact funds for public improvements on public lands but further seeks clarification as to whether an impact fund loan or grant decision must be withheld until title or a satisfactory possessory interest is acquired by Ferron City in the real property to be improved as a golf course. In view of the preceding discussion it is my opinion that an impact fund loan and/or grant agreement could be presently entered into with Ferron City but the payment of the funds thereunder would have to be conditioned upon the acquisition of title or a long-term lease agreement consistent with the use of such public funds by Ferron City and subject to approval by the Permanent Community Impact Fund Board.
Very truly yours,

Jack L. Crellin
Assistant Attorney General
Governmental Affairs Division

ATTACHMENT

NOTE: In conformity with the Attorney General's internal policy on opinions, this informal (letter) opinion does not deal with issues of such broad public import that it would justify detailed scrutiny by the Attorney General himself or official publication in the manner of a formal opinion. Nevertheless, it is authoritative for the purposes of the agency requesting it and with respect to the specific questions presented, represents the position of the Attorney General as expressed through his designated staff member.

September 20, 1978
***2** Re: Legality of using public funds and equipment for terracing private dry-farm lands (Opinion Request No. 78–297)

Mr. B. H. Harris

Cache County Attorney

31 Federal Avenue

Logan, UT 84321

Dear Mr. Harris:
Your letter dated September 7, 1978, requesting an opinion as to the legality of using county funds and equipment to provide a dryland terrace demonstration project on private land, incorporating new technology, has been referred to me for reply.

It is noted that you have not given us the benefit of your own research and opinion upon the subject matter and we must again reiterate that, in accordance with the policy of the Utah Attorney General in maintaining the responsibility of local attorneys to their governmental employers, your future requests for opinions from this office must be accompanied by your own opinion and supporting authorities upon the questions presented for review by this office. Otherwise, they will be returned to you for compliance with such policy.

The question as to when public funds are expended in aid of private enterprise in violation of Article VI, Section 29, Utah Constitution, is not easily resolved and depends upon whether the benefits to private individuals are only incidental to the public purpose of the expenditure. Thus in Tribe v. Salt Lake City Corporation, 540 P. 2d 499, (Utah, 1975), the question was raised as to whether the benefits inuring to private individuals by the construction of a proposed parking facility pursuant to a city redevelopment agency's plan for redevelopment dealing with urban blight rendered the proposed expenditures unconstitutional, and the court held as follows at pages 503–504:
With reference to appellant's claim that procedures under this Act, as proposed, will grant private benefits through the use of public money, we note that there may be some private benefits—it is hard to imagine how a facility such as the one proposed here could be constructed without conferring a benefit on some private individual or individuals—but any benefit which might inure to a private individual through the construction of the parking facility is strictly incidental to the public purpose of the agency in redeveloping the area to terminate urban blight. The funds are being used by a public body for a public purpose, i.e., to terminate urban blight; they are not being given or loaned to a private person, nor are they used primarily for private purposes. This particular question was dealt with in Redevelopment Agency of the City and County of San Francisco v. Hayes. The court there said that the fundamental test of the constitutionality of the statute requiring the use of public funds is whether the statute is designed to promote the public interest, as opposed to the furtherance of the advantage of individuals; and such a statute should not be declared unconstitutional because of the fact that, incidental to the main purpose, there results an advantage to individuals.

***3** In the subsequent case of Utah Housing Finance Agency v. Smart, 561 P. 2d 1052 (Utah, 1977), the Utah Supreme Court sustained the Utah Housing Finance Agency Act designed to increase the availability of mortgage funds for low and moderate income housing. Again the problem of conferring private benefits was addressed by the court which concluded:
Appellants assert that the act is constitutionally offensive because its operation will confer certain private benefits. There is an obvious private benefit to persons who are able to obtain housing financing through the Agency who would not have been able to obtain it elsewhere. There is less substantial benefit to mortgage leaders who participate in the Agency's mortgage transactions. These benefits, however, are merely incidental to the dominant purpose of the Act to alleviate a serious statewide shortage of decent low and moderate income housing, with its consequent ill effects. While it is improper to spend public funds for private purposes, such private benefits incidental to a dominant public purpose do not detract from the constitutionality of the legislation.

Unlike the situation in the Tribe case, the benefits to be conferred upon private land by the use of public funds and equipment to provide demonstration terracing thereon would be direct and not incidental. The public benefits, as set forth in the letter from the United States Department of Agriculture, Soil Conservation Service, attached to your opinion request, would be (1) maintaining long-term productiveness of the soil for future generations, (2) improvement in water quality, and (3) lower costs

to maintain roads and other transportation networks in these areas. None of the foregoing would result from the demonstration project itself but only by the adoption of the demonstrated technique on a county-wide scale with farmer acceptance resulting from alleged economic savings. It would appear, therefore, that the public benefits to be derived from the proposed expenditure of county funds and use of county equipment are speculative and merely incidental to the private benefit conferred upon the private lands involved in the demonstration project.

In the Utah Housing Finance Agency case, the public purpose of alleviating an existing problem (a serious shortage of housing for a large segment of the public) by raising low interest funds for financing by sale of tax exempt self-liquidating bonds was held to be an acceptable means of accomplishing the public purpose which fell squarely within the police power of the legislature to deal with the health, safety and morals of the populace. The statute expressly prohibited the self-liquidating debts and obligations of the Agency from becoming debts of the state thereby precluding them from constituting a lending of the state's credit, and the court held that an agency which supports itself by the sale of self-liquidating notes and bonds in no way obligates the state to raise or spend tax revenues, and, therefore, creates no state debt. Thus that case is totally different from the proposal herein whereby the general funds of the county would be directly involved in improving private property.

***4** In a letter opinion to the Council of State Governments from the late Assistant Attorney General Homer Holmgren dated August 26, 1974, a copy of which is herewith enclosed, it was concluded that Article VI, Section 29, of the Utah Constitution prohibits the State of Utah from providing 25 percent matching funds under federal grants to pay individual or family needs resulting from disasters in those cases where the individual or family is unable to meet such expense. Likewise in a letter opinion from the undersigned to the Bountiful City Attorney dated November 11, 1976, (copy enclosed), it was concluded that a city may not pay sewer backup claims without regard to liability. And in a letter opinion to the Payson City Attorney dated May 12, 1978, copy also enclosed, I concluded that the use of city funds to pay the legal expenses of former employees of Payson City to bring an action to recover city contributions to the state retirement fund for the benefit of such former employees would clearly offend against the constitutional and statutory prohibitions against the use of public funds for private purposes.

In view of the foregoing, it is my opinion, in the absence of a declaratory or other court judgment otherwise, that the use of county funds and equipment to provide terracing and improvements to private land for a demonstration project on new farm technology, would constitute an expenditure of public funds for private pruposes in violation of Article VI, Section 29 of the Utah Constitution.
Very truly yours,

Jack L. Crellin
Assistant Attorney General

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