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OPINION NO. 2016 - 02

TO: Brent Mattingly, Finance Director and Chief Financial Officer
FROM: Steve Burg, Acting City Attorney S.J.B.
DATE: June 8, 2016
SUBJECT: Development Fee Credit Opinion

QUESTION: Does issuance of Development Agreement Impact Fee credits require compliance with Title 34 public bidding requirements?

ANSWER: No. Development fee credits are not public monies, whereby "expenditure" or "issuance" requires compliance with the Title 34 bidding process.

This Opinion, to the extent herein stated, modifies and amends in part, but does not supersede, Opinion No. 2014-01, dated September 25, 2014.

OPINION:

In Opinion No. 2014-01, this office found pursuant to the Arizona Supreme Court ruling in *Achen-Gardner, Inc. v. Superior Court in and For County of Maricopa*, 173 Ariz. 48 (1992), that:

(i) Off-site, street related improvements are structures within the scope of competitive bidding laws,
(ii) Development agreements for off-site improvements are subject to public bidding requirements, and
(iii) A city is prohibited from reimbursing a developer for public street improvements unless it complied with the bidding law requirements.

Opinion No. 2014-01 adds that "Title 34 bidding requirements must be followed by private developers doing construction under a development agreement in which a city, county, or town is to repay a portion of the money with public funds."

This opinion addresses a narrower question: Is a developer who seeks reimbursement for dedicated public improvements with credits required to follow Title 34 bidding requirements?

Development Fee Credits

The City "shall provide a credit toward the payment of a development fee" for public infrastructure that was required, or provided by a developer and subsequently

dedicated to the City, providing it is included in and identified in the infrastructure improvement plan. A.R.S. § 9-463.05(10) and (11). A "credit" is a "reduction in an assessed development fee" resulting from dedications of eligible improvements permitted by Chapter 20 of the Peoria City Code. See § 20-31. Eligible credits are determined, calculated, allocated, and must be issued pursuant to a Credit Allocation Agreement. Peoria City Code § 20-40.

Development Fee Credits Are Not Public Funds

Two factors persuaded the Arizona Supreme Court that off-site improvements conducted under a development agreement was a "public project" that required compliance with Title 34: (1) the project was on "public property," and (2) reimbursement for the improvements will come from "public funds." *Achen-Gardner* at 52-53, 1097-1098. Thus, public projects utilizing public funds mandate compliance with Title 34 competitive bidding requirements. *Achen-Gardner* at 54, 1099.

Generally, "public funds" or "public money" is defined as ""bonds and evidence of indebtedness, and money belonging to, received or held by, state, county, district, city or town officers in their official capacity." A.R.S. § 35-302. Moreover, when the state seeks civil remedies relating to "public monies," such money is identified as "all monies coming into the lawful possession, custody or control of state agencies, boards, commissions or departments or a state officer, employee or agent in his official capacity, irrespective of the source from which, or the manner in which, the monies are received." A.R.S. § 35-212(B).

When considering if funds are "public money," courts have found it to be critical if state or local officers have actually "received or held" the funds, and have "lawful possession" of the funds "in their official capacity." See *State v. Mecham*, 173 Ariz. 474, 481, 844 P.2d 641, 648 (Ct. App. 1992).

In what appears to be a confirmation of the notion that public funds must actually be in the hands of public officials, the Arizona Supreme Court found that tax credits for donations to school tuition organizations (e.g., private and sectarian organizations) were neither "public money or property," nor was there an actual "appropriation" of anything in violation of the Establishment Clause of the United States and Arizona Constitutions which prohibit aid to any church, or private or sectarian school. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999). The court concluded the tax credits were not "public money" in the traditional meaning of the words and rejected the argument that these tax credits were public money because a "taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit." *Kotterman* at 284-285, 617-618. The court observed that stating such a position would "require a finding that state ownership springs into existence at the point where taxable income is first determined," which would be "both artificial and premature." *Id.* Moreover, these tax credits were not "appropriated" from general revenues "for an identified purpose or destination" by

operation of the statute at issue, a power normally belonging to the legislature.[1] *Kotterman* at 287, 620. Also see *Green v. Garriott*, 221 Ariz. 404, 415, 212 P.3d 96, 107 (Ct. App. 2009), as amended (Apr. 15, 2009)(corporate tax credit dollars have not been appropriated, and, indeed, cannot be appropriated until they fall into the hands of the state).

Furthermore, where an official is "a mere custodian or conduit" of the funds, this does not render them public monies. *Kotterman* at 284, 617. The court cited other cases in other jurisdiction to support the proposition that money not in the hands or under the authority of the public official is not public money, including a California case which found that "rent forbearance and inspection cost waivers are not public funds." *McIntosh v. Aubry,* 14 Cal.App.4th 1576, 18 Cal.Rptr.2d 680, 688–89 (1993).[2] See *Kotterman* at 284, 617.

Thus, money that is neither in the possession of, nor held in any official capacity by, a state or local official, is not "public money." With this in mind, the Arizona Supreme court concluded that tax credits are not public money, as they are neither in the possession of, nor held in any official capacity by, a state or local official.

There are similarities between a tax credit and development fee credit. First, the definitions are similar. Generally, a tax credit is a reduction of tax liability, i.e., the credit reduces the amount of taxes a person would otherwise have to pay. An impact fee credit is similarly defined as reductions in development fees, whereby the credit reduces a fee a developer would otherwise have to pay. See A.R.S. § 9-463.05(10) and (11); Peoria City Code §§ 20-31 and 20-40.

Tax credits are creatures of the legislature, made available and controlled by statute and sought out and utilized by tax payers. Development fee credits are also creatures of the legislature, made available by statute (and City Code) and sought out and utilized by developers.

An "eligible" development fee credit does not exist unless and until a developer has provided a financial contribution or constructed a "capital facility" improvement and dedicated the improvement, as provided by the Peoria City Code.[3] That is, no fee credits exist until an affirmative and proper action by the developer, without involvement

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[1] An appropriation is the "setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." *League of Arizona Cities & Towns v. Martin*, 219 Ariz. 556, 560, 201 P.3d 517, 521 (2009). See also *Fogliano v. Brain ex rel. Cty. of Maricopa*, 229 Ariz. 12, 18, 270 P.3d 839, 845 (Ct. App. 2011), as amended (Apr. 17, 2012).

[2] Although the California legislature superseded *Mcintosh*, in part, the finding that rent forbearance and cost inspection waivers were not public funds was not affected, and further referenced, but neither revised nor modified, in *State Building & Construction Trades Council of California v. Duncan*, 162 Cal. App. 4th 289, 307, 76 Cal. Rptr. 3d 507, 521 (2008), as modified on denial of rehearing (May 16, 2008). Related here, *State Building* found low income housing tax credits are not public funds requiring workers to be paid prevailing wages.

[3] There are other requirements that determine eligibility of a fee credits, such as inclusion in the Infrastructure Improvement Plan (IIP), but they are not relevant to this opinion and will not be referenced.

by the City. Once the developer acts, the fee credit is created. Then a Development Impact Fee Credit Agreement must be executed, which defines how fee credits will be allocated and issued. It is the sole obligation of the developer to request allocation of credits through a Fee Credit Agreement. Peoria City Code § 20-40(d)(2). Credits are issued by reducing applicable-category development fees, as they are incurred at the time a building permit is issued.[4]

There is no action by the City, except to acknowledge creation of the credit; enter into a credit agreement to allocate the credits as requested by the developer; and to keep track of the credits to make sure the fee is credited against the correct development fee category, the credit has not expired, and the credits are issued until exhausted. Just as with tax credits, the City (1) does not "appropriate" development fee credits and (2) cannot make an appropriation because the "credits" are not in the possession of the City, and the City has no authority over credits but for the Development Impact Fee Credit Agreement.

Use of Development Fee Credits Is Not Subject to the Requirements of Title 34

When read together, both *Achen-Gardner* and various state statutes make clear that construction of public buildings and infrastructure projects requires compliance with the bidding process in Title 34. However, if the money is not public, a public procurement, bidding process is not required. There is substantive Arizona case law that supports the proposition that tax credits are not public money. Development fee credits possess many of the same characteristics of tax credits and similarly should not be considered public money.

The City does not possess or hold the credits in an account, as it would public money. Credits are created only upon affirmative action of a developer. The City does not appropriate credits for the City's intended and specified use, as it would public money. Credits are issued and allocated pursuant only to a credit agreement, executed upon creation of the credits. There are no credits waiting to be issued or allocated generally – credits are created under eligible circumstances, and can only be issued under agreed-upon conditions.

Therefore, because development fee credits are not an expenditure of public money, issuance of credits does not require compliance with Title 34 bidding requirements.

[4] A fee credit may also come in the form of reimbursement. Reimbursements from the City are not the subject of this opinion, and remain subject to the findings and conclusions of law in Peoria City Attorney Opinion No. 2014-01.