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February 16, 1990

The Honorable Emmett S. Pugh III  
Mayor, City of Beckley  
Drawer AJ  
Beckley, West Virginia 25802-2832

Dear Mayor Pugh:

You have requested the opinion of the Attorney General on the following question:

[W]hether a municipality may establish an area business development corporation, which would have as its purpose the promoting, developing, and advancing of business and industrial prosperity and economic welfare of the greater metropolitan area, and may contribute general funds, not otherwise appropriated, to the corporation, which general funds would potentially be used by the corporation to invest in a Certified West Virginia Capital Company.

You have asked whether revenue may be legally transferred from the city's general fund to an area business development corporation, in the following specific factual context:

1. The area comprising the City limits of Beckley has been and continues to be economically depressed to the detriment of its citizens.
2. It is within the power and duty of the government of the municipality to attempt to improve the economic climate of the City, and thereby elevate the standard of living of its citizens.
3. The Mayor and City Council of the municipality propose to organize and establish an area development corporation ("Corporation") pursuant to West Virginia Code 8-32-2, for the purpose of promoting, developing, and advancing the business

and industrial prosperity and economic welfare of the municipality and its citizens, and for the purpose of stimulating and promoting the expansion of all kinds of business and industrial activity, which will advance, develop, and maintain economic stability, and provide maximum opportunities for employment in the City limits.

4. The Corporation would be incorporated and organized as a non-stock, non-profit corporation under the laws of the State of West Virginia. The articles of incorporation would specify that no member of the Board of Directors of the Corporation shall receive any compensation or profit from the Corporation, and that the Corporation is operated in compliance with all charter provisions.
5. Furthermore, the Mayor and the City Council of the municipality would have the power and the right to demand, at any time, that the Corporation make a full and complete accounting of all receipts and disbursements.
6. The Corporation to be organized and established by the Mayor and the City Council of the municipality would apply for, and do all those things necessary to obtain from the Internal Revenue Service, a ruling or determination letter granting to the Corporation tax exempt organization status pursuant to Internal Revenue Code 501(a), by virtue of its qualification under IRC 501(c)(4), due to the Corporation's express and stated purpose of promoting social welfare.
7. The Board of Directors of the Corporation would, by its charter, consist of the Mayor of the municipality, several members of the City Council of the municipality, and a certain fixed number of business and community leaders in the municipality and its immediate surrounding area, who are independent of the municipality; provided, that the total number of directors will be more than ten, and a multiple of three. Members of the Board of Directors shall receive neither a salary nor any type of remuneration for their services as members of the Board.
8. The City Council of the municipality would authorize and approve a contribution to the Corporation of a

certain sum of money from its general funds, which are not now encumbered.

9. The Board of Directors of the Corporation would have the authority, within its discretion, to invest, distribute or otherwise administer, the funds contributed by the municipality in a manner that it determines would best meet the objectives of the Corporation, which authority would include the ability to authorize and approve the investment of the funds in a Certified West Virginia Capital Company, established pursuant to Chapter 5E of the West Virginia Code.
10. The Board of Directors of the Corporation, if investment in a capital company be determined by them to be the best method by which to meet the objectives of the Corporation, would have the ability to authorize and approve an agreement with a private co-investor, which private co-investor would invest an equal amount of money in the Certified West Virginia Capital Company.
11. The proceeds received by the Corporation as a result of the liquidation of the Certified West Virginia Capital Company, would be retained indefinitely by the Corporation to be utilized by the Corporation for the purpose of meeting the objectives of the Corporation.

Your letter and our subsequent discussion raise three issues. They are: (1) whether a municipality has the power to establish an area business development corporation which may invest in private businesses, (2) whether the establishment of such a corporation under the above facts would violate any provision of the West Virginia Code or Constitution, and (3) whether such an area development corporation may invest in a Certified West Virginia Capital Company.

It is necessary to examine the powers granted to municipal corporations to determine whether a municipality may establish an area development corporation. You have stated that the City's charter and Code are mute on the subject of participation in an area development corporation or a certified West Virginia Capital Company. The general powers of a municipal corporation are limited by the West Virginia Constitution in Article VI, Section 39(a), and set out in West Virginia Code, Section 5, Article 12, Chapter 8:

In addition to the powers and authority granted by (i) the constitution of this State, (ii) other provisions of this chapter (iii) other general law, and (iv) any charter, and to extent not inconsistent or in conflict with any of the foregoing except special legislative charters, every municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon: . . . [t]o protect and promote the public morals, safety, health, welfare, and good order.

W. Va. Code § 8-12-5 (1989 Supp.).

More specifically, W. Va. Code § 8-32-2 (1989 Supp.) allows a municipality to establish and contribute to an area development corporation. It empowers a municipality to "become associated with and to participate as a member of any area development corporation . . . ." However, the Corporation must satisfy certain organizational requirements and be organized to meet certain objectives in order for the municipality to be statutorily authorized to establish the Corporation and to participate as a member thereof.

The Corporation must be chartered as a nonstock, nonprofit corporation under the laws of the State of West Virginia. W. Va. Code § 8-32-2 (1989 Supp.). It must be organized for the following purposes:

[P]romoting, developing, and advancing the business prosperity and economic welfare of the area embraced, its citizens and its industrial complex . . . locating new business and industry within such area and rehabilitating and assisting existing businesses and industries therein; stimulating and promoting the expansion of all kinds of business and industrial activity which will tend to advance, develop, and maintain economic stability and provide maximum opportunities for employment in such area; cooperating and acting in conjunction with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural and recreational developments within such area; and . . . the promotion, development and conduct of all types of business, agricultural and recreational activities within each area . . . .

W. Va. Code § 8-32-2 (1989 Supp.).

The West Virginia Legislature expressly found these required purposes are for the general welfare of the public, and are, therefore, public purposes. W. Va. Code § 8-32-2 (1989 Supp.).

West Virginia Code § 8-32-2 (1989 Supp.) requires that the charter of the Corporation contain a provision specifying "that no member trustee or member of the board of directors (by whatever name the same may be called) of the corporation shall receive any compensation, gain, or profit from such corporation, and such corporation is operated in compliance with all charter provisions." Finally, the municipality must have the right to require, as a condition of the contribution to the Corporation, that the Corporation, upon demand, make a full and complete accounting of all receipts and disbursements. W. Va. Code § 8-32-2 (1989 Supp.).

West Virginia Code § 8-32-2 (1989 Supp.), quoted above, specifically grants to the municipality the authority to contribute general funds, not otherwise appropriated, to the projects of the Corporation. The projects of the Corporation are those activities it engages in for the purpose of meeting its stated objectives. As described in Section 2, those authorized activities of the Corporation include:

[E]ncouraging and assisting through loans, investments, or other business transactions . . . cooperating and acting in conjunction with other organizations, federal, state or local, . . . and furnishing money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite [to meet the objectives of the Corporation].

W. Va. Code § 8-32-2 (1989 Supp.).

Thus, an area development corporation is given broad authority by W. Va. Code § 8-32-2 to engage in a wide range of activities to meet its objectives. It is also granted authority by W. Va. Code § 31-14-1 et seq. (1988) to engage in a wide range of activities by virtue of its charter as a business development corporation.

West Virginia Code § 31-14-2 (1988) provides that "[a]ny number of persons, not fewer than ten . . . may associate to create a business development corporation . . . [and] may exercise the powers, rights, and privileges hereinafter provided." This provision also describes the required objectives of the Corporation, which are identical to those objectives the Corporation might pursue in order for a municipality to be a participant or contributor. These objectives include the following:

To promote, develop and advance the business prosperity and economic welfare of the State of West Virginia and its citizens; . . . locating of new business and industry within the State and to rehabilitate and assist existing businesses and industries; to stimulate and promote the expansion of all kinds of business and industrial activity which will tend to advance business and industrial development and maintain the economic stability of the State, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of the State; to cooperate and act in conjunction with the department of commerce and with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural and recreational developments within the State; . . . [and] the promotion, development and conduct of all kinds of business activity within the State.

W. Va. Code § 31-14-2(3) (1988).

To achieve these objectives, the Corporation is granted authority, by that same Code section, to engage in certain activities. Those activities are identical to the activities authorized by W. Va. Code § 8-32-2 for area development corporations established by and contributed to by a municipality, and include:

[T]o encourage and assist through loans, investment or other business transactions . . . to cooperate and act in conjunction with the department of commerce and with other organizations, federal, state or local, . . . and to furnish money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite [to meet the objectives of the Corporation].

W. Va. Code § 31-14-2 (1988).

Also, W. Va. Code § 31-14-5 (1988) grants to area business development corporations, along with, and in addition to, those powers conferred upon general business corporations, certain specified powers. Included in these specified powers is the power to acquire "any part thereof, or interest therein, from any persons, firms, partnerships, corporations, joint-stock companies, associations, or trusts . . . ", W. Va. Code § 31-14-5(e) (1988), and:

To acquire, subscribe for, own, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the stock, shares, bonds, debenture, notes or other securities and evidences of interest in, or indebtedness of, any person, firm, corporation, joint-stock company, association or trust, and while the owner or holder thereof to exercise all the rights, powers and privileges of ownership . . . .

W. Va. Code § 31-14-5(f) (1988).

Therefore, by virtue of the grants of authority in W. Va. Code § 31-14-2, W. Va. Code § 31-14-5(e), and W. Va. Code § 31-14-5(f) (1988), and of the ability of an area business development corporation, established and contributed to by a municipality, to utilize such grants of authority, pursuant to W. Va. Code § 8-32-2 (1989 Supp.) the Corporation may invest in private businesses to meet the objectives for which it was organized.

We will now address the second aspect of your inquiry: whether the establishment of such a corporation, under the facts presented in your letter, would violate any provision of the West Virginia Constitution.

We must first review the structure of the West Virginia Constitution as it relates to municipal corporations. The Constitution of West Virginia was amended in 1935 by Article VI, Section 39(a), which provides for general laws governing municipal corporations. The amendment sets limits on municipal corporations, retains for the state broad powers over municipal government, and provides that municipal corporations are subject to the limitations on state power provided by the state constitution:

[t]he electors of each municipal corporation . . . may pass all laws and ordinances relating to its municipal affairs: Provided, that . . . any such law or ordinance so adopted, shall be invalid and void if . . . in conflict with this Constitution . . .

W. Va. Const. art. VI, § 39(a).

It is important here to discuss the nature of the state constitution. Each state possesses all power necessary to the government of its people, except to the extent that it has been delegated to the federal government by the federal constitution or its amendments. In granting power to the federal government, the states did not limit themselves with regard to the police powers which they retained. Subsequently, the states adopted state

constitutions which act as a restraint of this police power, not as a grant of power.

The state constitutional provisions relevant to the constitutionality of W. Va. Code § 8-32-2 are Article X, Section 4 and Section 6. In a decision which determined the constitutionality of the Industrial Development Bond Act, the West Virginia Supreme Court of Appeals observed that these constitutional provisions apply equally to counties and municipalities. State ex rel. County Court of Marion v. Demus, 148 W. Va. 398, 135 S.E.2d 352 (1964).

Article X, Section 4, of the West Virginia Constitution reads as follows:

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

In an important 1984 decision, the West Virginia Supreme Court of Appeals held that solid waste authority steam plant bonds which were to be retired by revenues appropriated annually by the Legislature were not unconstitutional. In determining whether such bond financing created state debt in violation of Article X, Section 4, the court did not look at whether the bond might be paid from future appropriations, but whether the Legislature was required to make such appropriations. "The ultimate issue in determining whether bond financing creates a state debt in violation of Article X, Section 4, is not whether the bonds may be paid from future legislative appropriations, but whether successive legislatures are obligated to make such appropriations." State ex rel. West Virginia Resource Recovery - Solid Waste Authority v. Betty E. Gill, \_\_\_ W. Va. \_\_\_, 323 S.E.2d 590, 596 (1984). Under Article X, Section 4, and Gill, Beckley city council may validly transfer general funds to the Area Development Corporation, but may not bind future councils to make a transfer for economic development or any other purpose.

In addition to the above considerations, W. Va. Code § 8-32-2 (1982) explicitly states that "[u]nder no circumstances whatever shall any action taken by any municipality . . . under the authority of this section give rise to or create any indebtedness on the part of the municipality . . ." The court has relied on similar language in bond instruments to find that no debt within



the constitutional prohibition has been created. Demus, supra; Brewer v. Point Pleasant, 114 W. Va. 572, 172 S.E. 717 (1934).

Article X, Section 6, of the West Virginia Constitution is also relevant to your inquiry. It reads as follows:

The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever.

W. Va. Const., art. X, § 6.

West Virginia Code § 8-32-2 (1989 Supp.) contains a specific grant of authority for a municipal corporation to establish and to fund an area regional development corporation. This statute should be construed with reference to the provisions of the constitution, and to the decisions of the West Virginia Supreme Court of Appeals regarding constitutional construction of statutes. "It will not be presumed that the legislature intended to confer authority upon any municipal corporation to violate the constitution; but the better and proper construction is that the legislature intended that the power by it conferred should be exercised under the restraint and restrictions, and in accordance with the positive provisions, of the constitution of the State." Brown v. Town of Point Pleasant, 36 W. Va. 290, 301-302, 15 S.E. 209, 213 (1892). There is always a presumption in favor of the constitutionality of an act of the Legislature. State ex rel. West Virginia Housing Development Fund v. Waterhouse, 158 W. Va. 196, 217, 212 S.E.2d 724, 736 (1974); State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W. Va. 636, 171 S.E.2d 545 (1969). W. Va. Code § 8-32-2 is presumed to be constitutional, and is distinguishable from Brown which proscribed direct investment by the municipality in a private corporation. W. Va. Code § 8-32-2 (1982) empowers municipalities to establish non-profit corporations for economic development purposes, and may be distinguished from a direct investment by the municipality in a private corporation.

West Virginia Code § 8-32-2 (1989 Supp.) was enacted for a salutary public purpose: stimulation of economic development and the relief of unemployment and the public ills which accompany it. The Legislature has broad discretion as to the definition of public purpose. A legislative declaration of purpose is entitled to respect and to a prima facie acceptance of its correctness. Waterhouse at 215, 212 S.E.2d at 735. Statutes which have as their

overall purpose the economic well-being of the State are to be construed liberally. 57 Ops. Att'y Gen. 139, 141 (1977).

There are no cases challenging the specific purposes public funds may be put to under W. Va. Code § 8-32-2 (1982). There are, however, several interpretations as to Industrial and Commercial Development Bonds under W. Va. Code § 13-2C-4 (1985), which confers certain economic development powers on municipalities and counties. In State ex rel. County Court of Brooke County v. Kemp, 151 W. Va. 349, 151 S.E.2d 680 (1966), the Supreme Court upheld acquisition of an existing industrial facility by the Brooke County Commission based on the county commission's finding that the acquisition of the facility, a spiral culvert plant:

[W]ould create additional employment and would, therefore, inure to the benefit of the public. This finding is clearly within the expressed legislative intent and, in the absence of fraud, collusion or bad faith, the wisdom of such finding cannot be questioned.

Kemp at 354, 151 S.E.2d at 683.

In State ex rel. Ohio County v. Samol, 165 W. Va. 714, 275 S.E.2d 2 (1980), the Supreme Court upheld the constitutionality of W. Va. Code § 13-2C-1, et seq. under which counties and municipalities issued revenue bonds for commercial projects. The court deferred to the county's determination of what was in the public interest. Although it is not controlled by the municipality's determination of a public purpose, the Court will grant great deference to it.

Analogous to the instant case, an Attorney General's opinion dated August 4, 1983, determined that county commissions may transfer public monies from their general funds to an area development corporation, pursuant to W. Va. Code § 7-5-18 (1984). 60 Ops. Att'y Gen. 67 (1983).

We conclude that the adherence to West Virginia constitutional limitations does not require that municipalities refrain from transferring funds to a non-profit corporation which directly invests in private industry in order to stimulate area economic development. Thus, the power granted to a municipal corporation by W. Va. Code § 8-32-2 (1982), to establish a nonstock, nonprofit area development corporation, is not violative of the West Virginia Constitution, as long as any debt incurred is the responsibility of the area development corporation and all revenues derived from its investments are the property of the area development corporation.

We are therefore of the opinion that the establishment of such a corporation by the City of Beckley in the manner which you have described would in all likelihood pass constitutional muster.

We will turn now to the final aspect of your inquiry: whether an area development corporation chartered by a municipal corporation may invest in a Certified West Virginia Capital Company.

The West Virginia Capital Company Act, W. Va. Code § 5E-1-1, et seq. (1987 and 1989 Supp.), was enacted for the following purposes:

- (1) Increasing the availability of development capital in order to encourage and assist in the creation, development and expansion of businesses based in West Virginia;
- (2) Developing, preserving, diversifying, expanding and strengthening the agricultural, industrial and business base of West Virginia's economy . . . ; and
- (3) Providing the residents of West Virginia with greater opportunities to invest and participate in the economic development and potential of this state.

W. Va. Code § 5E-1-3(b) (1987).

In addition, legislative rules which establish the application procedures to implement the Capital Company Act define an applicant for a qualified tax credit under the Capital Company Act as follows:

Applicant shall mean:

- (1) a profit or non-profit entity, organized and existing under the laws of West Virginia, which is created for the purpose of making venture capital available for qualified investments or,
- (2) a West Virginia business development corporation created pursuant to Article 14, Chapter 31 of the Code; that seeks to be designated by the Board as a Qualified Company. For purposes of this definition, entity includes, but is not limited to, a corporation (including an S Corporation), a partnership, and a trust.

117 CSR 1, Section 1.5.1.2.

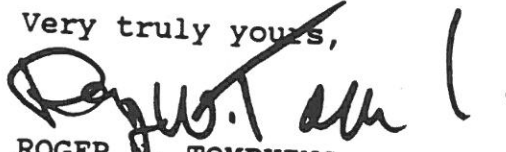
Thus, it appears that the Corporation which you contemplate establishing may invest in a West Virginia capital company.


You state that the board of the Corporation would have the authority and ability to authorize an agreement with a private co-investor and that the private co-investor would invest an amount equal to the Corporation's investment in the Certified West Virginia Capital Company. There is no provision in the Capital Company Act or regulations which prohibits such an agreement. You have not asked us to consider, and we have not addressed, any question relating to an area development corporation forming a partnership with a private investor.

In summary, this office is of the opinion that:

- (1) Pursuant to West Virginia Code § 8-32-2 (1989 Supp.), a municipal corporation may establish a nonstock, nonprofit area development corporation, and may appropriate to it general funds, not otherwise encumbered, to finance its investments.
- (2) The establishment of such a corporation by a municipality is not violative of the West Virginia Constitution, as long as any debt incurred is the responsibility of the area development corporation and all revenues derived from its investments are the property of the area development corporation.
- (3) An area development corporation so created may potentially invest in a Certified West Virginia Capital Company.

Very truly yours,

  
ROGER W. TOMPKINS  
ATTORNEY GENERAL

  
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