

OPINION NO. 85-011**Syllabus:**

Ohio Const. art. VIII, §13 and appropriate legislation empowering the Department of Economic and Community Development (currently the Department of Development) to expend money for the purpose of attracting the development of business and industry in the state authorize the Department to make industrial inducement grants to, and for the benefit of, private, for-profit corporations if such grants are for the acquisition, construction, enlargement, improvement or equipment of property, structures, equipment and facilities within the state for industry, commerce, distribution, and research.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 9, 1985

I have before me your request for my opinion concerning industrial inducement grants issued by the Department of Development. I have rephrased your questions as follows:

1. May the Ohio Department of Development issue industrial inducement grants to private, for-profit companies from General Revenue Fund moneys under authority of Ohio Const. art. VIII, §13 or are such grants unconstitutional under Ohio Const. art. VIII, §4?
2. May the Ohio Department of Development issue industrial inducement grants to private, non-profit companies (i.e., community improvement corporations) from General Revenue Fund moneys under similar authority when it is known that such moneys will then be given to private, for-profit companies?
3. Under what conditions, if any, may a political subdivision, upon receipt of industrial inducement grants from the Ohio Department of Development, grant such moneys to private, for-profit companies?

It is my understanding that these questions have arisen as the result of an audit of the Department of Development performed by your office. The Department has made industrial inducement grants to three grantees: a for-profit corporation, a private, non-profit corporation, and a political subdivision. The first grant was made to a private, for-profit company, to reimburse the company for the cost of a water treatment and supply system and for other payments "related to the public benefit." The second grant was made to a community improvement corporation in order to assist a private, for-profit corporation in the acquisition of an industrial site and for site improvement and assistance in construction. The third grant was made to a city for real property acquisition and site improvements to property which was then to be leased to a private, for-profit corporation. These grants were made from moneys in the State's General Revenue Fund.

There is no question that the Department, in making the above-described grants, acted pursuant to clear legislative authority. The Department has the general authority to "develop and promote plans and programs designed to assure that state resources are efficiently used, economic growth is properly balanced, community growth is developed in an orderly manner, and local governments are coordinated with each other and the state." R.C. 122.01. See R.C. 122.04 (setting forth the Department's development duties); R.C. 122.06 (setting forth the Department's planning duties); R.C. 166.02. The grant to the city was made from moneys appropriated under Am. Sub. H. B. 191, 112th Gen. A. (1977) (eff. June 30, 1977) pursuant to section 26 (uncodified) of Am. Sub. S. B. 221, 112th Gen. A. (1977) (eff. Nov. 23, 1977). Section 26 of Am. Sub. S. B. 221 reads as follows:

Of the moneys appropriated to the Emergency Purposes Fund of the Controlling Board in appropriation item 911-401 All Purposes in Am. Sub. H.B. 191 of the 112th General Assembly, an amount may be made available to the Department of Economic and Community Development for the purpose of attracting the development of business and industry in the state. These moneys may be released by the board upon the approval of a request submitted by the department. (Footnote added.)

The grants to the private, for-profit corporation and to the community improvement corporation were made from General Revenue Fund moneys appropriated to the Industrial Facilities Establishment Fund of the Department of

¹ The name of the Department of Economic and Community Development was changed to the Department of Development in 1982 by Am. Sub. H.B. 536, 114th Gen. A. (1982) (eff. May 13, 1982).

Economic and Community Development pursuant to Am. Sub. H. B. 204, 113th Gen. A. (1979) (eff. July 30, 1979). Section 211 (uncodified) of Am. Sub. H. B. 204 reads as follows:

The appropriation item 195-412 Industrial Facilities Establishment Fund made to the Department of Economic and Community Development in Section 27 of this act may be expended only after the submission of a request to the Controlling Board by the Department of Economic and Community Development outlining the planned use of the funds, and the subsequent approval of the request by the Controlling Board. Of the appropriation item 195-412 Industrial Facilities Establishment Fund, \$1,000,000 shall be reserved for use on a special project during the 1979-1981 biennium subject to the prior approval of the Controlling Board.

Although the Department of Economic and Community Development acted pursuant to clear legislative authority,² you question whether the grants were made in violation of Ohio Const. art. VIII, §4. Article VIII, §4 reads as follows:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; 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.

Ohio Const. art. VIII, §4 has been given an expansive interpretation, see 1978 Op. Att'y Gen. No. 78-040; 1977 Op. Att'y Gen. No. 77-047, and clearly prohibits the state from making a grant or gift to a private enterprise. See State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955); Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N.E. 28 (1898).³

The courts, however, have recognized an exception to the prohibition against the state lending its aid and credit. Aid and credit may be given to public organizations and private, non-profit organizations, as long as the aid is used for a public purpose. See Bazell v. City of Cincinnati, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968); State ex rel. Dickman v. Defenbacher; State ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 91 N.E.2d 512 (1950); State ex rel. Leaverton v. Kerns, 104 Ohio St. 550, 136 N.E. 217 (1922); State ex rel. Taft v. Campanella, 51 Ohio App. 2d 237, 368 N.E.2d 76 (Cuyahoga County 1977), aff'd, 50 Ohio St. 2d 242, 364 N.E.2d 21 (1977). While a public purpose may be sufficient to validate the giving or loaning of aid and credit to a public or private, non-profit organization, it is insufficient to validate the giving of aid to a private, for-profit entity. See State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964); Op. No. 78-040 at 2-96 ("[t]he public purpose exception depends upon the nature of the recipient or partner as well as the purpose for which the funds are spent or the venture is undertaken"). Further, art. VIII, §4 prohibits the state from giving aid and credit to a public or non-profit organization if such aid is given in order to benefit a for-profit corporation, even

² Both section 26 (uncodified) of Am. Sub. S. B. 221, 112th Gen. A. (1977) (eff. Nov. 23, 1977) and section 211 (uncodified) of Am. Sub. H. B. 204, 113th Gen. A. (1979) (eff. July 30, 1979) require that the Controlling Board approve the release of funds made pursuant to those provisions. Nothing in my files indicates that the Department failed to comply with this requirement, and for purposes of this opinion, I assume that this requirement has been met.

³ Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N.E. 28 (1898) deals with §6 of article VIII of the Ohio Constitution, which prohibits counties, cities, towns, and townships from lending their aid and credit to private enterprises in language similar to that of §4. It has been concluded that cases interpreting either §4 or §6 may be used in construing the other provision. See State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 330 N.E.2d 454 (Franklin County 1974); 1978 Op. Att'y Gen. No. 78-040; 1977 Op. Att'y Gen. No. 77-047.

though, again, there may be a public purpose for extending the aid. State ex rel. Saxbe v. Brand.

Turning to the three grants at issue, it appears that each would be prohibited by Ohio Const. art. VIII, §4. The first grant was made directly to a private, for-profit corporation. The second and third grants, while made to a non-profit corporation and political subdivision, were given for the apparent purpose of assisting private, for-profit corporations. Accordingly, these grants appear to fall within the proscription of art. VIII, §4.

Although the grants in question fall within the prohibition of art. VIII, §4, certain exceptions to art. VIII, §4 have been provided in the state constitution. Article VIII, §13 states as follows:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, and to authorize the making of guarantees and loans and the lending of aid and credit, which laws, bonds, obligations, loans, guarantees, and lending of aid and credit shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or of Article XII, Sections 6 and 11, of the Constitution, provided that moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.

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The powers herein granted shall be in addition to and not in derogation of existing powers of the state or its political subdivisions, taxing districts, or public authorities, or their agencies or instrumentalities or corporations not for profit designated by any of them as such agencies or instrumentalities.

Any corporation organized under the laws of Ohio is hereby authorized to lend or contribute moneys to the state or its political subdivisions or agencies or instrumentalities thereof on such terms as may be agreed upon in furtherance of laws enacted pursuant to this section. (Emphasis added.)

Section 13 provides that the lending of aid and credit in accordance with the terms of that provision is not subject to the prohibitions of Article VIII. Thus, laws may be passed to authorize lending aid and credit for the purpose of acquiring, constructing, enlarging, improving, or equipping property, structures, equipment and facilities within the state for industry, commerce, distribution, and research without running afoul of art. VIII, §4.

As discussed above, the lending aid and credit prohibition of article VIII, §4 has been construed as prohibiting grants or gifts of public funds. Because sections 4 and 13 relate to the same subject, they must be construed together and in a consistent manner. See generally State ex rel. Pratt v. Weygandt, 164 Ohio St. 463,

132 N.E.2d 191 (1956). See also County of Stark v. Ferguson, 2 Ohio App. 3d 72, 440 N.E.2d 816 (Stark County 1981). Section 13 now permits, within the limitations set forth therein, that which was previously prohibited by §4. Thus, although a grant of state money to a private, for-profit enterprise would be prohibited by §4, such grant may be permissible under §13 if it falls within the terms of §13.

As discussed above, the grants in question were made pursuant to legislation enacted to attract the development of business and industry within the state. Further, it is my understanding that the grants were made for the acquisition, construction, improvement or equipment of property, structures, equipment and facilities within the state for industry and commerce. Thus, I believe that the grants about which you ask were properly made under the authority of art. VIII, §13.

As a final matter, I note that §13 provides that "moneys raised by taxation shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section." From an examination of §13 as an entirety, it is apparent that this provision merely restricts the state's ability to borrow money or make guarantees if the state's obligation is secured by tax revenues. Cf. State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 459 N.E.2d 208 (1984) (a municipal corporation may not extend credit to a private association where the extension is financed by bonds or notes guaranteed by tax revenues of the municipality). It does not purport to preclude the expenditure of current tax revenues for the purpose of making loans or otherwise lending the aid or credit of the state for the purposes authorized in §13. In this instance, the grants were made by the Department of Economic and Community Development from moneys which had been appropriated by the General Assembly. No pledge or other obligation was executed requiring the state to make additional payments of tax moneys. The grants were paid in full from the money appropriated under the relevant legislation. Thus, the fact that the grants in question were made from tax revenues does not take them out of the exception of §13.

In sum, it is my opinion that the grants in question fall within the scope of §13 and accordingly, were proper expenditures of state money.

In conclusion, it is my opinion, and you are advised, that Ohio Const. art. VIII, §13 and appropriate legislation empowering the Department of Economic and Community Development (currently the Department of Development) to expend money for the purpose of attracting the development of business and industry in the state authorize the Department to make industrial inducement grants to, and for the benefit of, private, for-profit corporations if such grants are for the acquisition, construction, enlargement, improvement or equipment of property, structures, equipment and facilities within the state for industry, commerce, distribution, and research.