S T A T E O F T E N N E S S E E
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Opinion No. 03-147

Industrial Development Corporations - Authority to Establish Incentive Loan Program

QUESTION

Does an industrial development corporation have statutory authority to establish an incentive loan program to benefit private for-profit entities and subsequently to forgive the loan depending on the number of new jobs created by the borrower?

OPINION

An industrial development corporation lacks the statutory authority to make the loan contemplated unless it is for a "project" as defined and, even if the loan is for a project, lacks the authority to forgive the debt if a certain number of new jobs should be created by the borrower.

ANALYSIS

This Office is informed that an industrial development corporation (the "Corporation") has accumulated approximately $100,000 over the years through payments in lieu of taxes. *See* Tenn. Code Ann. § 7-53-305. The Corporation is proposing using those accumulated payments to fund loans to new or expanding companies. The loans will be forgiven provided the borrowers meet certain projected employment requirements.

The first part of the question is whether the Corporation has the authority to make the loans. Under Tenn. Code Ann. § 7-53-302(a)(7), the Corporation has authority to make loans with respect to "projects". A "project" as defined in Tenn. Code Ann. § 7-53-101(11) means any land and building (including an office building), any facility or other improvement thereon, and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, which shall be suitable for one or more of certain enumerated activities. The authority to make the loan is with respect to the tangible assets involved in the activity, not with respect to the activity itself. The statutory scheme provides no authority to make working capital loans or loans for worker training. For purposes of this opinion, this Office will assume that the loan contemplated is for a "project" as defined in the statute since a loan by the Corporation for anything else does not appear

to be authorized. *See, e.g.*, Op. Tenn. Atty. Gen. 88-136 (August 1, 1988) and Op. Tenn. Atty. Gen. 86-62 (March 13, 1986).

If the loan is for a "project," the real issue arises from the contemplated forgiveness of the loan upon the satisfaction of certain conditions. This Office finds no specific authority for such a forgiveness scheme.

Tenn. Code Ann. § 7-53-302(a)(8) provides additional powers of the Corporation as follows:

> [to] sell, exchange, donate and convey any or all of its properties, including, without limitation, all or any part of the rents, revenues and receipts of the corporation from its projects, whenever its board of directors shall find any such action to be in furtherance of the purposes for which the corporation was organized.

The term "properties" is used in that provision rather than the term "projects" as defined in Tenn. Code Ann. § 7-53-101(11). "Properties" is more expansive that the term "projects" and is specifically said to include "revenues and receipts of the corporation from its projects," such as the payments in lieu of taxes. While it could be argued that the program contemplated is not a loan but a donation within the ambit of Tenn. Code Ann. § 7-53-302(a)(8), because the Corporation contemplates that the "loan" ultimately will be forgiven, this Office does not think that such an argument is valid. As the program is described, repayment is required unless certain prescribed numbers of jobs are created by the borrower. Thus, the program does not present the appearance of a donation as that term is customarily understood.

Moreover, Tenn. Code. Ann. § 7-53-308 provides that no part of the Corporation's net earnings remaining after the payment of its expenses shall inure to the benefit of any individual, firm or corporation. As this Office has previously stated, it would appear to be difficult to structure a donation of revenues to a separate entity by an industrial development corporation consistent with Tenn. Code Ann. § 7-53-308. *See* Op. Tenn. Atty. Gen. No. 97-049 (April 15, 1997).

Thus, it is the opinion of this Office that the Corporation lacks statutory authority to make the loan contemplated unless it is for a "project" as defined and, even if the loan is for a project, the Corporation lacks the authority to forgive the debt if certain numbers of jobs are created.

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